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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

KARL W. CHRISTEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

ANN DURNEY
MARY FRANCES CLARK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the fact that respondents' workday meals are taken subject to restrictions related to their duties as state highway patrolmen entitles them to deduct the costs of those meals as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code (26 U.S.C.), despite the general rule of Code Section 262 that "no deduction shall be allowed for personal, living, or family expenses."

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Kathleen Christey, Steven L. Pillsbury and Holly Pillsbury were plaintiffs in the district court and are respondents here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 841 F.2d 809. The opinion of the district court (App., *infra*, 26a-52a) is unofficially reported at 86-2 U.S. Tax Cas. (CCH) ¶ 9594.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 23a-24a) was entered on March 2, 1988. A petition for rehearing was denied on July 21, 1988 (App.,

infra, 25a). On October 12, 1988, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including (Sunday) December 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Internal Revenue Code (26 U.S.C.) provides in pertinent part:

> SEC. 161. ALLOWANCE OF DEDUCTIONS.
>
> In computing taxable income under section 63, there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (Sec. 261 and following, relating to items not deductible).
>
> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; * * *
>
> SEC. 261. GENERAL RULE FOR DISALLOWANCE OF DEDUCTIONS.
>
> In computing taxable income no deduction shall in any case be allowed in respect of the items specified in this part.
>
> SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

1. Respondents Karl W. Christey and Steven L. Pillsbury are employed as troopers by the Minnesota State Highway Patrol, which is a state agency charged with enforcing traffic laws, investigating traffic accidents, and directing and controlling traffic.[1] Troopers also provide assistance to the public and cooperate with other law enforcement agencies in pursuing criminals. The normal working day for troopers is between 8½ and 9 hours, although a shift may stretch into 12 hours. Troopers are also subject to call 24 hours a day. App., *infra*, 2a.

Troopers are required to comply with the rules and regulations contained in the General Orders of the Patrol. General Order R 77-20-008 (see App., *infra*, 47a-48a), which was in effect during 1981 and 1982, provides troopers with specific instructions concerning their meal breaks while on duty. It requires that troopers "eat their meals in a public restaurant adjacent to the highway whenever practical" and that they "report by radio when they eat and * * * advise the telephone number or the code number of the restaurant where they are eating." The General Order prohibits troopers from eating meals at home during working hours, and it has been interpreted to prohibit troopers from bringing meals from home and eating in their patrol cars. Troopers are required to eat their meals at the specific times indicated on the work schedule "unless the call of duty demands otherwise." The General Order also sets forth the times when troopers should eat and the

[1] Holly L. Pillsbury and Kathleen M. Christey are parties to those refund actions only because they filed joint income tax returns with their spouses for the years at issue (App., *infra*, 2a n.3). For convenience, we will use the term "respondents" to refer to Karl Christey and Steven Pillsbury.

length of time allowed for a meal during a normal work shift, and it provides that no more than two troopers may eat together. Failure to adhere to these instructions renders troopers subject to reprimand. The stated purpose of these requirements "is to promote public safety and obedience to the law through a physical presence of Troopers in uniform and to facilitate, through availability to the public, the reporting of accidents and the dissemination of information with reference to the traffic and motor vehicle laws of the state." The Order also ensures that meal breaks are staggered so as to maintain maximum coverage of patrol areas with minimal call response time. App., *infra*, 3a, 47a-48a.

There was testimony at trial to the effect that troopers are subject during meals to calls for emergencies and other Patrol business to which they must respond immediately. Troopers are also subject to interruptions during meals from members of the general public who are seeking information about road conditions, weather, traffic laws, or other subjects relating to the responsibilities and duties of troopers. Thus, troopers frequently are interrupted during their meals and sometimes are unable to finish meals for which they have paid. App., *infra*, 3a-4a.[2]

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[2] The record is unclear on the actual extent of interruptions and their effects on respondents' meal consumption. Respondent Pillsbury testified that he had been called out from meal breaks about 42% of the time in 1981 and about 50% of the time in 1982 (Tr. 59), but was unable to state whether the calls had come at the beginning or end of his break, admitting that on some of those occasions he had finished his meal (*id.* at 71). Respondent Christey testified that he had never consumed a meal while on duty without interruption (*id.* at 34), but did not indicate how often his meals were left uneaten. See App., *infra*, 4a n.4.

2. On their federal income tax returns for 1981 and 1982, respondents deducted the costs of restaurant meals they had purchased while on duty during those years.[3] The Commissioner disallowed the entire amounts of the claimed deductions. Both respondents then paid the taxes due and filed substantially identical claims for refund, asserting that their meal expenses were deductible as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code,[4] because they were required by their employer to eat at certain times and places and had often been required to purchase meals that they could not complete because of their duties.[5] The In-

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[3] On his federal income tax returns for 1981 and 1982, respondent Christey deducted $962.66 and $880.28, respectively, for his meals while on duty. Respondent Pillsbury, who kept no records of amounts he spent for meals while on duty during those years, deducted $1,410 and $1,452, respectively, for his meals for 1981 and 1982. Prior to trial, Pillsbury reduced the amount of meal expenses he claimed for 1981 and 1982 to $944 and $968, respectively. App., *infra*, 31a-33a.

[4] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[5] In addition, respondents claimed that the amounts paid for their meals were deductible under Section 162(a)(2) of the Code, as traveling expenses while away from home. This claim, which is foreclosed by *United States* v. *Correll*, 389 U.S. 299 (1967), was not pursued at trial. Respondents also asserted that portions of the cash allowances paid to them by the state are deemed to be for certain expenses, including meal expenses (see Minn. Stat. Ann. § 299D.03 (West 1982)), and should be excluded from their gross income under Section 119 of the Code, which relates to meals furnished for the convenience of the employer. The district court held that

ternal Revenue Service either denied the claims or failed to grant them within six months, and respondents each subsequently brought these suits for refund in the United States District Court for the District of Minnesota, where they were consolidated (see App., *infra*, 26a-27a).[6]

The district court held in favor of respondents (App., *infra*, 26a-52a). Finding that "[t]he deductibility * * * of the meal expenses is determined with reference to Section 162(a)" of the Code (*id.* at 39a), the court concluded that respondents' meal expenses were deductible as "ordinary and necessary" business expenses under the general provision of Section 162(a). The court explained that respondents "were subject to a number of duty-related restrictions and requirements concerning their meals while on duty" because they were required to eat their meals in roadside restaurants and those meals were subject to work-related interruptions (App., *infra*, 43a). The court concluded that these restrictions "effectively extended the performance of their duties from patrol cars on highways to tables in restaurants" (*ibid.*). The court also stated that respondents' meals were taken "for the convenience and benefit of the Patrol" and not for their own "convenience or comfort * * * (which was often lacking because of frequent, but

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Commissioner v. *Kowalski*, 434 U.S. 77 (1977), foreclosed this claim (App., *infra*, 41a-42a), and respondents did not appeal from this holding.

[6] Each respondent originally sought to maintain his suit as a class action, but the district court never certified a class. Respondents abandoned their efforts to proceed with class actions on the basis of assurances by the government that the decision in their cases would probably apply to other similarly situated troopers. App., *infra*, 27a-28a.

welcome, interruptions from members of the public and sudden, but not unexpected, emergency calls)" (*id.* at 44a).

A divided court of appeals affirmed (App., *infra*, 1a-22a). The court held that the district court's conclusion that respondents' meal expenses qualified for deduction as ordinary and necessary business expenses was "a question of fact and will not be set aside unless clearly erroneous" (*id.* at 5a). The court rejected the government's contention that, as a matter of law, the meal expenses were "personal" expenses rendered nondeductible by Section 262 of the Code. The court first stated that the case was not controlled by two decisions of this Court (*Commissioner* v. *Kowalski*, 434 U.S. 77 (1977), and *United States* v. *Correll*, 389 U.S. 299 (1967)) that had overruled the Eighth Circuit's prior decision (*United States* v. *Morelan*, 356 F.2d 199 (1966)) upholding the deductibility of trooper meal expenses and the exclusion from income of meal allowances. The court explained that those decisions had not addressed the question of deductibility under the general provision of Section 162(a). App., *infra*, 6a-7a. The court then held that, although "the cost of one's meals is ordinarily a personal expense which is nondeductible under § 262," this case falls into the category of "certain limited circumstances" in which a personal expense can be deducted as a business expense (App., *infra*, 7a). The court then proceeded to uphold as not clearly erroneous the district court's conclusion that the restrictions imposed on the troopers' meals in this case rendered their meal expenses deductible as business expenses (*id.* at 9a-11a).

Judge McMillian dissented (App., *infra*, 11a-22a). He pointed out that Section 262 prohibits any deduc-

tion for personal expenses unless expressly allowed by another provision of the Code and that this principle has led the courts consistently to reject claims that the costs of meals consumed at work are deductible (App., *infra*, 12a-13a). He also noted the relevance of Supreme Court precedent on this issue, stating that if "the general provisions of § 162(a) were available to render job-related-meal expenses deductible, it is difficult to see why the Supreme Court in *United States* v. *Correll*, needed to concern itself with whether they were traveling expenses under § 162(a)(2)" (App., *infra*, 15a). Judge McMillian concluded that "the expenses which the district court found to be ordinary and necessary expenses of [respondents'] business as employees were instead ordinary and necessary expenses of their daily sustenance," and their deduction "clearly is not permitted by the express provisions of § 262 of the Internal Revenue Code" (App., *infra*, 17a-18a).

REASONS FOR GRANTING THE PETITION

The court of appeals here affirmed as not clearly erroneous the district court's conclusion that the existence of certain job-related restrictions rendered respondents' clearly personal daily meal expenses deductible as ordinary and necessary business expenses under the general provision of Section 162(a) of the Code. This holding cannot be squared with the clear dictates of the Code, which in Section 262 explicitly prohibits the deduction of personal expenses unless "expressly provided" elsewhere in the Code. The holding below also cannot be squared with this Court's decision in *United States* v. *Correll*, 389 U.S. 299 (1967), where the Court held that meal expenses are not deductible as "traveling expenses" under Code

Section 162(a)(2) if not incurred on an overnight trip. That decision, as well as numerous lower court decisions refusing to allow deductions for meals and other personal expenses incurred in connection with the taxpayer's employment, rests on the basic principle that the deduction of personal expenses must be expressly authorized by the Code and cannot be treated like other, nonpersonal, expenses deductible as "ordinary and necessary" business expenses under the general provisions of Section 162(a).

It is apparent that the troopers' meal expenses at issue here were not so imbued with a business necessity as to destroy their character as personal expenses. Cf. pages 16-17 & note 12, *infra*. The troopers expended these funds because they were hungry, not because the Highway Patrol required it, and the meals were a personal benefit to them just like the meals that other types of workers consume during the workday. In allowing the expenses to be deducted, therefore, the court of appeals has violated the Code's special limitation on the deductibility of personal expenses, and instead invited innumerable claims for their deduction, depending upon the outcome of an undefined inquiry into the almost infinite variety of circumstances of each person's employment. This departure from the statutory structure, unless reversed by this Court, opens the door to the deduction of expenses not authorized by Congress and encourages substantial factbound litigation, which will have major deleterious effects on tax administration.

1. The court below failed to give sufficient consideration to the specific directions given by Congress for accommodating the various provisions of the Internal Revenue Code. In particular, Chapter One of the Code, which is addressed to the "normal taxes and

surtaxes" segment of the income tax, expressly delineates the relationship between its general prohibition on the deduction of personal expenses and its general grant of a deduction for ordinary and necessary business expenses, and those instructions provided by Congress control this case. Section 162(a) is contained in Part VI, which covers "itemized deductions," and it permits a deduction for "ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business"—the deduction found applicable here by the courts below. But the Section introducing Part VI, Section 161, provides: "In computing taxable income under section 63, there shall be allowed as deductions the items specified in this part, *subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible)*" (emphasis added). Thus, as this Court has recognized (*Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 17-18 (1974)), the Code expressly makes the availability of itemized deductions, including the general business expense deduction, subject to the superior provisions of Part IX.

Part IX addresses "items not deductible," and the Section introducing it, Section 261, states the general rule: "In computing taxable income no deduction shall in any case be allowed in respect of items specified in this part." Section 262 then proceeds to describe the first of these nondeductible items: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." Thus, there can be no doubt that, *as a matter of law*, the Code prohibits the deduction of personal expenses unless the deduction is expressly authorized by a specific provision. And it is similarly clear that a taxpayer's outlays for meals that he consumes—especially daily meals—ordinarily constitute

a personal expense that is rendered nondeductible under Section 262. See *United States* v. *Correll*, 389 U.S. at 301-302 & n.7; Treas. Reg. § 1.262-1(b)(5). The court of appeals accordingly seriously erred in characterizing the ultimate issue here as a factual question on which it was required to follow the district court unless its decision was clearly erroneous. Rather, the question whether a taxpayer may deduct personal expenses on the ground that the work-related restrictions to which they are subject qualifies them as ordinary and necessary business expenses is a *legal* question—one that the Code answers in the negative.

The Code does contain some sections that expressly authorize the deduction of personal expenses and therefore override the general nondeductibility rule of Section 262. With respect to meal expenses, Section 162(a)(2) allows the deduction of "traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business." And Section 217 allows the deduction of "moving expenses * * * in connection with the commencement of work by the taxpayer * * * at a new principal place of work"; moving expenses are defined in Section 217 (b)(1)(B), (C), and (D) to include certain meals.[7]

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[7] The final sentence of Treas. Reg. § 1.262-1(b)(5) states: "Except as permitted under section 162, 212, or 217, the cost of the taxpayer's meals not incurred in traveling away from home are personal expenses." Section 212 of the Code permits a taxpayer to deduct the ordinary and necessary expenses incurred for the production of income. While Section 212 does not expressly deal with travel or meal expenses, the Court has stated that the deductions allowed by this Section are coextensive with those allowed by Section 162 in connec-

In addition, Section 119 of the Code, while not directly addressed to the deduction of meal expenses, permits a taxpayer to exclude from gross income meals "furnished for the convenience of the employer" on the employer's business premises.

In accordance with the plain dictates of Section 262, the substantial previous litigation on the question of the deductibility of troopers' meals has focused on whether a deduction is expressly authorized by one of these sections. Section 217, relating to moving expenses, clearly provides no conceivable basis for a deduction. But in *United States* v. *Morelan*, 356 F.2d 199 (8th Cir. 1966), several Minnesota state troopers (including respondent Karl Christey) argued that the daily meal allowance paid to them by the state was excludable from gross income under Section 119. The Eighth Circuit agreed (356 F.2d at 201-208) and also held that, in any event, the cost of their meals eaten while on duty would be deductible under Section 162(a)(2) as a traveling expense (356 F.2d at 208-210). This Court, however, subsequently overruled both of the holdings of *Morelan*. *United States* v. *Correll*, *supra* (meals not deductible as traveling expenses because taxpayer was not away from home overnight); *Commissioner* v. *Kowalski*, 434 U.S. 77 (1977) (Section 119 applies only to meals furnished in kind and hence meal allowances are not excludable from gross income).

The decision below cannot reasonably be reconciled with this Court's decision in *Correll*. It is true that the Court there did not expressly reject the proposition that personal meal expenses can be deducted as

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tion with a trade or business. *Trust of Bingham* v. *Commissioner*, 325 U.S. 365, 374 (1945); see also Rev. Rul. 84-113, 1984-2 C.B. 60.

ordinary and necessary expenses under the general provision of Section 162(a); the taxpayers, in accordance with the dictates of Section 262, had relied only upon the specific provisions of Section 162(a)(2). But the Court's opinion plainly reflects the understanding that a business expense deduction could be available for personal meal expenses only if the specific requirements of Section 162(a)(2) were met, not under the general provision of Section 162(a). The Court noted that the meal costs were a "personal living expense" (389 U.S. at 302) rendered nondeductible by Section 262 unless otherwise expressly provided by Congress (389 U.S. at 300 & n.3, 302 n.7). As a consequence, the Court stated that Congress "made the total cost of meals and lodging deductible *only* if incurred in the course of travel that takes the taxpayer 'away from home'" (*id.* at 302 (emphasis added)). And the Court stated that "the taxpayer whose business requires no travel [that would bring him within the reach of Section 162(a)(2)] cannot ordinarily deduct the cost of the lunch he eats away from home" (*id.* at 302 n.7). Indeed, as Judge McMillian noted in his dissent below (App., *infra*, 15a), if job-related meal expenses routinely could be deducted under Section 162(a), there was no reason for this Court in *Correll* to focus on the particulars of the Section 162(a)(2) deduction for traveling expenses. In short, respondents' claim that their workday meals can be deducted as a business expense has already been rejected by this Court.

2. Apart from its inconsistency with *Correll*, the decision below runs counter to a long line of lower court cases that deny deductions for work-related meal expenses. In *Moss* v. *Commissioner*, 758 F.2d 211 (7th Cir.), cert. denied, 474 U.S. 979 (1985),

the court denied a deduction for meal expenses incurred by law partners at lunchtime business meetings, even though the court assumed that these meetings were necessary to coordinate the firm's business and that lunch was the most convenient time because the lawyers were in court at other times during the day. The Tax Court, which was unanimous in denying the claimed deduction, observed in that case that "[d]aily meals are an inherently personal expense, and a taxpayer bears a heavy burden in proving they are routinely deductible" (80 T.C. 1073, 1078 (1983)). The courts accordingly have denied deductions for meal expenses in circumstances almost identical to those in this case (see *Hammond* v. *Commissioner*, 49 T.C.M. (CCH) 1562 (1985), aff'd, 785 F.2d 304 (4th Cir. 1986) (Virginia state trooper's meals); *Moscini* v. *Commissioner*, 36 T.C.M. (CCH) 1002 (1977) (police officer's restaurant meals where employer did not permit a bag lunch)) and in quite different contexts (see, *e.g.*, *Antos* v. *Commissioner*, 35 T.C.M. (CCH) 387 (1976), aff'd, 570 F.2d 350 (9th Cir. 1978) (accountant's meals taken during overtime work); *Matteson* v. *Commissioner*, 33 T.C.M. (CCH) 479 (1974) (nurse's meals at hospital)).[8]

Outside the context of meal expenses, the courts have consistently denied deductions for personal expenses where the connection to employment was considerably stronger than in this case. Even if an

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[8] See also, *e.g.*, *Fife* v. *Commissioner*, 73 T.C. 621 (1980) (attorney meals with clients); *Hankenson* v. *Commissioner*, 47 T.C.M. (CCH) 1567 (1984) (doctor's luncheon meetings with staff); *Kammerer* v. *Commissioner*, 35 T.C.M. (CCH) 30 (1976) (doctor's meals while on call at hospital); *Moffit* v. *Commissioner*, 31 T.C.M. (CCH) 910 (1972) (same).

expense would not have been incurred "but for" the fact of the taxpayer's employment, it is still not deductible if it is a personal expense. See *Kroll* v. *Commissioner*, 49 T.C. 557, 567 (1968). The classic example is the cost of commuting to and from work. See *Commissioner* v. *Flowers*, 326 U.S. 465 (1946); see also *Pollei* v. *Commissioner*, 87 T.C. 869 (1986) (commuting by police captains who were on duty during drive to work), appeal pending, Nos. 87-1159 and 87-1160 (10th Cir.). Indeed, even where a personal expense is required as a condition of employment, it is not deductible.[9] See, *e.g.*, *Pevsner* v. *Commissioner*, 628 F.2d 467 (5th Cir. 1980) (no deduction for apparel required for work if it is also suitable for ordinary use); *Stiner* v. *United States*, 524 F.2d 640 (10th Cir. 1975) (same).[10]

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[9] In this case, it cannot seriously be contended that the meal expenses were a condition of employment. Apart from the fact that meals were to be taken in roadside restaurants, respondents retained control over their expenses. They decided where to eat, what food to order, how much to spend, and, indeed, whether to eat at all. The court of appeals observed that most people would not forgo a meal during an 8½ hour shift and therefore that the troopers' decision to eat should not be regarded as "a question of personal choice" (App., *infra*, 10a n.11). But whether or not it is regarded as a matter of "personal choice", it is undeniable that the fact that most troopers would choose to eat during that period reflects the personal need for nourishment, not some independent need of the Minnesota Highway Patrol. The majority's observation therefore only lends support to the dissent's conclusion that respondents' meal expenses were "ordinary and necessary expenses of their daily sustenance," not ordinary and necessary business expenses (App., *infra*, 17a).

[10] See also *Drake* v. *Commissioner*, 52 T.C. 842, 843-844 (1969) (cost to officer of frequent haircuts required by military regulations is a nondeductible personal expense); *Bake-*

This Court stated in connection with commuting expenses that "[w]e cannot read § 262 * * * as excluding such expense[s] from 'personal' expenses because by happenstance the taxpayer must carry incidentals of his occupation with him" (*Fausner* v. *Commissioner*, 413 U.S. 838, 839 (1973)). The same observation is true of meal expenses; the fact that the meals include some of the burdens of the taxpayer's occupation does not take them out of the category of personal expenses rendered nondeductible by Section 262.

The court below relied on the one court of appeals case that appears to diverge from this consistent line of authority. In *Sibla* v. *Commissioner*, 611 F.2d 1260 (9th Cir. 1980), a fireman took a deduction for payments he made to an organized mess at the station. The mess had been established as part of a desegregation plan and participation was mandatory, unless a fireman was officially excused on the ground of a physical ailment. A plurality of the Tax Court found that the unusual circumstances of the case—the involuntary participation, including mandatory payment even when the taxpayer could not be present during the mess period, and the fact that the mess was designed to promote desegregation rather than as a benefit for the firemen—justified the conclusion that the payments to participate in the mess lost their character as a personal expense and could be deducted under Section 162(a). See 611 F.2d at 1262. Pay-

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well v. *Commissioner*, 23 T.C. 803, 805 (1955) ("A businessman's suit, a saleslady's dress, the accountant's glasses are necessary for their business but the necessity does not overcome the personal nature of these items and make them a deductible business expense.").

ing considerable deference to the Tax Court (*ibid.*), a divided panel of the Ninth Circuit affirmed.

The correctness of *Sibla* is open to question,[11] but, in any event, it provides no basis for the decision below or for departing from the long line of decisions noted above. Noting that *Sibla* rested in large part on the fact that participation in the mess was mandatory and that it was not designed for the benefit of the employees, the Tax Court has distinguished it in more recent cases and denied deductions for payments to a firemen's mess. See *Duggan* v. *Commissioner*, 77 T.C. 911, 915 (1981); *Alvarado* v. *Commissioner*, 49 T.C.M. (CCH) 967, 970 (1985), aff'd, 781 F.2d 901 (5th Cir. 1986). It remains true that, in the absence of unusual circumstances, which are not present here, meal costs are personal expenses that may not be deducted under Section 162(a).[12]

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[11] The Internal Revenue Service originally published nonacquiescences in the cases consolidated in *Sibla* (1978-1 C.B. 2, 3), but it later withdrew them and substituted acquiescences (1985-2 C.B. viii).

[12] The cost of providing meals to business guests in the course of advancing one's business is deductible under Section 162(a). In *Sutter* v. *Commissioner*, 21 T.C. 170, 173 (1953), the Tax Court held that in such circumstances the costs of the taxpayer's own meals were deductible only to the extent that "the expenditure in question was different from or in excess of that which would have been made for the taxpayer's personal purposes." This type of apportionment inquiry is analogous to the inquiry originally used in determining the deductibility of traveling expenses. The IRS found that standard to be impossible to administer, and, at its request, Congress enacted the predecessor of Section 162(a)(2), which allows the entire amount of traveling meals and lodging expenses to be deducted. See *United States* v. *Correll*, 389 U.S. at 301 n.6. The IRS encountered the same administrative diffi-

3. The decision of the court of appeals, if permitted to stand, will have a substantial adverse impact on the administration of the tax laws. Even as limited to state troopers, the decision here is significant. There are 511 troopers in Minnesota alone (App., *infra*, 28a), and there are many thousands more in other states who likely are subject to meal restrictions analogous to those applicable to respondents. See, *e.g.*, *Hammond* v. *Commissioner*, *supra*. The decision below disturbs what had been the settled rule that these troopers' meal expenses were not deductible, and it encourages a new round of litigation on the topic—one that should result in disparate treatment for similarly situated taxpayers in light of *Correll*.

Moreover, the result reached by the court below is particularly troubling because it confers a preferential tax advantage upon a select group of taxpayers in a situation that seems clearly at odds with the will of Congress. As this Court noted in *Commissioner* v. *Kowalski*, 434 U.S. at 96, the Code did contain a special rule for a short time that permitted state troopers to exclude their meal allowances from gross income. Congress repealed that special rule in 1957, however, explaining that it was "inequitable since there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Thus, it appears that certain police officials by reason of this [re-

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culties with apportioning "business lunches." Accordingly, in Rev. Rul. 63-144, 1963-2 C.B. 129, 135, it announced that "[t]he Service practice has been to apply this rule largely to abuse cases where taxpayers claim deductions for substantial amounts of personal living expenses. The Service does not intend to depart from this practice."

pealed] exclusion are placed in a more favorable position taxwise than other individual income taxpayers who incur the same types of expense * * *." H.R. Rep. 775, 85th Cong., 1st Sess. 7 (1957). Therefore, Congress apparently recognized that the meal situation of state troopers was not significantly different from that of many other individuals who were required by the Code to treat their meal expenses as nondeductible personal expenses. Having deliberately removed the troopers' preferential tax advantage in the form of an exclusion from income, it is hardly likely that Congress at the same time sought to grant the troopers a closely equivalent advantage in the form of a deduction.

In any event, the impact of the decision below is not confined to state troopers. The decision broadly pronounces the question of deductibility of meal expenses to be a factual question and proceeds to hold that relatively minor job-related restrictions can cause payments for daily sustenance to be deductible as business expenses. There are many individuals in various walks of life whose job limits their lunch options and requires them to be available for emergencies. The decision below, by embracing a factual inquiry that is not demarcated by any discernible criteria, invites everyone to take to court their "limitless factual variations" (*United States* v. *Correll*, 389 U.S. at 307) on meal restrictions, or other personal expenses. The result would be serious erosion of the rule of nondeductibility of personal expenses, and an administrative nightmare with extensive litigation, little predictability, and the likelihood of divergent results on similar facts. The disarray that the Court believed it was preventing in *Correll*—having " 'every meal-purchasing taxpayer * * * take

pot luck in the courts' " (389 U.S. at 302 (quoting *Commissioner* v. *Bagley*, 374 F.2d 204, 207 (1st Cir. 1961))—would in fact become a reality.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

ANN DURNEY
MARY FRANCES CLARK
Attorneys

DECEMBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5433

KARL W. CHRISTEY and KATHLEEN CHRISTEY
on behalf of all others similarly situated, APPELLEES,

v.

UNITED STATES OF AMERICA, APPELLANT.

STEVEN L. PILLSBURY and HOLLY L. PILLSBURY
on behalf of all others similarly situated, APPELLEES,

v.

UNITED STATES OF AMERICA, APPELLANT.

Appeal from the United States District Court
for the District of Minnesota

Submitted: September 1, 1987
Filed: March 2, 1988

Before McMILLIAN, JOHN R. GIBSON and FAGG, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The sole issue before us is whether taxpayers, members of the Minnesota Highway Patrol, are entitled to

deduct as ordinary and necessary business expenses under § 162(a)[1] of the Internal Revenue Code expenses incurred for restaurant meals while on duty. The Internal Revenue Service disallowed the deduction, but the district court[2] concluded that such expenses were deductible under § 162(a) and therefore the taxpayers were entitled to refunds for the 1981 and 1982 tax years. On appeal the government argues that the taxpayers' meal expenses are not business expenses, but personal expenses not deductible under § 262 of the Internal Revenue Code. We affirm the judgment of the district court.

Steven L. Pillsbury and Karl W. Christey[3] are employed as state troopers by the Minnesota State Highway Patrol. The Patrol is charged by law with enforcing traffic laws, investigating traffic accidents, directing and controlling traffic, providing information and assistance to the public, and cooperating with other law enforcement agencies in apprehending violators of criminal laws. *See* Minn. Stat. § 299D.03, subd. 1 (1986). The normal working day for troopers is between 8½ and 9 hours, although a shift may stretch into 12 hours. Troopers are also subject to call 24 hours a day.

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[1] Under § 2 of the Tax Reform Act of 1986, Pub. L. No. 99-515, 100 Stat. 2085, the Internal Revenue Code of 1954 is redesignated the Internal Revenue Code of 1986. The period at issue in this case antedates the 1986 Act. Accordingly, references herein shall be to the Internal Revenue Code of 1954.

[2] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

[3] Holly L. Pillsbury and Kathleen M. Christey are also parties to this suit solely by virtue of having filed joint income tax returns with their spouses for the years in issue.

As a requirement of their job, troopers must comply with the rules and regulations contained in the General Orders of the Patrol. These orders address in detail the conduct required of troopers while on duty. General Order R 77-20-008 ("the General Order") provides troopers with specific instructions concerning meal breaks while on duty. The General Order requires that troopers "eat their meals in a public restaurant adjacent to the highway whenever practical" and "report by radio when they eat and * * * advise the telephone number or the code number of the restaurant where they are eating." The restaurant must be open to the public and may not serve liquor. The Order prohibits troopers from eating meals at home during working hours and has been interpreted to prohibit troopers from bringing meals from home and eating in their patrol cars. The Order also details the time at which troopers may eat, the time allowed for a meal, and the number of troopers who may eat together. Failure to adhere to these instructions renders troopers subject to reprimand.

As set forth in the General Order, the principal purpose of these requirements "is to promote public safety and obedience to the law through the physical presence of troopers in uniform and to facilitate, through availability to the public, the reporting of accidents and the dissemination of information with reference to the traffic and motor vehicle laws of the state." The Order also ensures that meal breaks taken by the troopers are designated and staggered in order to maintain maximum coverage of patrol areas with minimal call response time.

There was testimony that during meals troopers are subject to calls for emergencies and other Patrol business to which they must respond immediately.

Troopers are also subject to interruptions from the general public who are seeking information about road conditions, weather, traffic laws, and other subjects relating to trooper responsibilities. Thus, troopers are frequently interrupted during their meals and are often unable to finish meals for which they have paid.[4]

The Christeys claimed a deduction of $926.66 for the meals Officer Christey purchased while on patrol in 1981 and a deduction of $880.28 for those purchased in 1982. The Pillsburys claimed a deduction of $944 for the meals Officer Pillsbury purchased while on patrol in 1981 and a deduction of $968 for those purchased in 1982. Both taxpayers claim the deductions as ordinary and necessary business expenses under I.R.C. § 162(a). After the I.R.S. disallowed the deductions, both taxpayers paid the taxes due and filed timely claims for refund, which the I.R.S. denied. These suits for refund in federal district court followed. The district court determined that Pillsbury's and Christey's expenses for meals while on duty were deductible as "ordinary and necessary" business expenses under the general provision of § 162(a) of the Internal Revenue Code. The court found that Pillsbury and Christey were "subject to * * * duty-related restrictions and requirements concerning their meals while on duty," and that their meals were taken "for the convenience and benefit of the patrol." Accordingly, the court held

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[4] In fact, after review of his radio log, Officer Pillsbury testified that he had been called out from meal breaks during 42 percent of his shifts in 1981 and during 50 percent thereof in 1982. Officer Christey testified that he has never consumed a meal while on duty without interruption.

the taxpayers were entitled to deduct the costs of meals purchased while on duty under § 162(a).

The district court's conclusion that the taxpayers' meal expenses qualify as ordinary and necessary business expenses is a question of fact and will not be set aside unless clearly erroneous. *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *Commissioner v. Heininger*, 320 U.S. 467, 475 (1943); *Long v. Commissioner*, 277 F.2d 239, 240-41 (8th Cir. 1960). A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (defining clearly erroneous standard as set forth in Fed. R. Civ. P. 52(a)). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, this court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* at 574.

Section 262 disallows the deduction of "personal, living, or family expenses * * * except as otherwise expressly provided in this chapter."

Section 162(a) expressly provides a deduction for all the "ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business, including * * * (2) traveling expenses (including amounts expended for meals * * * while away from home)."

The government does not challenge the factual findings of the district court but argues that the court erred in concluding that the taxpayers are entitled to deduct meal costs incurred while on patrol duty under the general permission of § 162(a). They

contend that the cost of meals is a personal expenditure and that the district court should have applied § 262 to disallow the deduction.[5]

In support of their contention that meal expenses are non-deductible personal expenses, the government particularly relies on two United States Supreme Court cases. *United States v. Correll*, 389 U.S. 299 (1967) and *Commissioner v. Kowalski*, 434 U.S. 77 (1977).[6] Neither of these cases, however, addresses the issue of whether meal expenses may be deducted as "ordinary and necessary" business expenses under

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[5] In the district court proceedings, the government contended that the troopers' meal expenses were not deductible under the specific provisions regarding meals of § 162(a)(2) or excludable under § 119, and thus could not be deducted under the general provision of § 162(a). However, by referring to *United States v. Correll*, 389 U.S. 299 (1977), and *Commissioner v. Kowalski*, 434 U.S. 77 (1977), the government implicitly raised the argument that § 262 precludes deductibility of meal expenses unless a deduction is specifically provided for. Similarly, the district court in its discussion of *Correll* recognized that the meal expenses under consideration in *Correll* were personal living expenses, generally non-deductible under § 262 rather than deductible traveling expenses under § 162(a)(2). The district court concluded that *Correll* did not foreclose a holding that meal expenses are deductible under the general provision of § 162(a). Contrary to the argument advanced in the dissent, it is apparent that the district court rejected the applicability of § 262 when it concluded the expenses were properly deductible under § 162(a).

[6] An earlier decision of this court, *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966), held that the subsistence allowance received by Minnesota state highway patrolmen was excludable from gross income under § 119, or in the alternative, deductible as a traveling expense under § 162(a)(2). *Kowalski* effectively overrules the first holding of *Morelan*, *id.* at 82, and *Correll*, the second, *id.* at 304.

the general provision of § 162(a). *Correll, supra,* concerned the deductibility of meal expenses as "traveling expenses" under § 162(a)(2), while *Kowalski, supra,* concerned the exclusion from gross income under § 119 of a cash meal allowance. Instead, the Court in *Kowalski* acknowledged that the deductibility of trooper meal expenses under the general provision of § 162(a) was not under consideration. 434 U.S. at 81 n.9.

It is beyond question that the cost of one's meals is ordinarily a personal expense which is nondeductible under § 262. Treas. Reg. § 1.262-1(b)(5) (1987). However, under certain limited circumstances, such expenses may be deducted under the general provision of § 162(a);[7] "that which may be a personal expense under some circumstances can when circumscribed by company regulations take on the color of a business expense," *Sibla v. Commissioner,* 611 F.2d 1260, 1262 (9th Cir. 1980). *Accord Cooper v. Commissioner,* 67 T.C. 870, *aff'd sub nom Sibla v. Commissioner,* 611 F.2d 1260 (9th Cir. 1980); *Walsh v. Commissioner,* 52 TCM (CCH) 1344 (1987); *Belt v. Commissioner,* 47 T.C.M.

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[7] In fact, the government in *Moss v. Commissioner,* 758 F.2d 211, 212 (7th Cir.), *cert. denied,* 474 U.S. 979 (1985), conceded that meals are deductible under § 162(a) when they are ordinary and necessary business expenses even if they are not within the express permission of any other provision. The court nevertheless disallowed the meal deduction finding that an attorney's share of his law firm's daily luncheon expense at an area restaurant was not a "necessary" business expense. *See also Hankenson v. Commissioner,* 47 T.C.M. (CCH) 1567 (1984); *See generally* Treas. Reg. 1.262-1(b)(5) which provides: "*Except as otherwise permitted* under section 162, 212, or 217 the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses" (emphasis added).

(CCH) 1433 (1984). In *Sibla, supra*, the taxpayers, Los Angeles firemen, were permitted to deduct under § 162(a) the cost of their participation in a mandatory mess plan, organized pursuant to a desegregation plan.[8] The firemen were required to pay a per diem amount for participation in the mess even if they brought their own meals or for some other reason did not eat the meals prepared in the mess. The Ninth Circuit held that the taxpayers' share of expenses of the mandatory organized mess was deductible as an ordinary and necessary business expense under § 162(a).[9] We therefore reject the government's argument that the district court erred in failing to apply § 262.

Additionally, the government contends that even if § 162(a) applies, the restrictions on the manner in which the taxpayers could take their meals while on duty were not so significant that they transformed an essentially personal expense into a business expense. They reason that the restrictions are no different from those placed upon other taxpayers who have to work during meals and are subject to interruptions. Further, the happenstance that the Patrol

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[8] *Cf. Alvarado v. Commissioner*, 49 T.C.M. (CCH) 967 (1985), *aff'd* 781 F.2d 901 (5th Cir. 1986) (unpublished opinion) (fireman's payments to common mess plan nondeductible under § 162(a) where payments were not required by the employer, taxpayer did not have to pay for unfinished meals, and mess was organized by the employees themselves for their own convenience); *accord Dugan v. Commissioner*, 77 T.C. 911 (1981); *Banks v. Commissioner*, 42 T.C.M. (CCH) 1016 (1981).

[9] The court also held that such expenses were excludable from gross income under § 119. Since the meals in this case were not furnished on the employer's premises, § 119 does not apply to this case. *Kowalski*, 434 U.S. at 84.

may derive incidental benefit from troopers' public visibility and their accessibility during meals does not operate to exclude taxpayers' meal expenses from personal or living expenses.

The district court, however, reasoned that the number of duty-related restrictions and requirements concerning their meals "effectively extended the performance of the troopers' duties from patrol cars on highways to tables in restaurants." Under these circumstances, the court concluded that the troopers' meal expenses were "ordinary and necessary" expenses. We do not believe this conclusion is clearly erroneous. This is not a case in which the taxpayers are attempting to deduct the cost of their meals merely because they are working overtime, *Coombs v. Commissioner*, 608 F.2d 1269 (9th Cir. 1979), or working through their meal break, *see Antos v. Commissioner*, 35 T.C.M. (CCH) 387 (1976), *aff'd* 570 F.2d 350 (9th Cir. 1978) (unpublished opinion), or where business activities make meals at home inconvenient. *Fife v. Commissioner*, 73 T.C. 621 (1980). Nor is this a case in which the sole restriction on the taxpayer is where he may eat his meal. *See, e.g., Walsh v. Commissioner*, 52 TCM (CCH) 1344 (1987); *Moscini v. Commissioner*, 36 T.C.M. (CCH) 1002 (1977); *Kammerer v. Commissioner*, 35 T.C.M. (CCH) 30 (1976). The restrictions here and their cumulative effect are substantial.[10] The troopers must

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[10] *Cf. Duggan v. Commissioner*, 77 T.C. 911 (1981); *Hammond v. Commissioner*, 49 T.C.M. (CCH) 1562 (1985), *aff'd*, 785 F.2d 304 (4th Cir. 1986) (unpublished opinion); *Moscini v. Commissioner*, 36 T.C.M. (CCH) 1002 (1977); *Borsody v. Commissioner*, 35 T.C.M. (CCH) 214 (1976); *Matteson v. Commissioner*, 33 T.C.M. (CCH) 479 (1974), *aff'd* without discussion of this issue, 514 F.2d 43 (8th Cir. 1975); *Weissfisch v. Commissioner*, 33 T.C.M. (CCH) 391 (1974); *Moffit v. Commissioner*, 31 T.C.M. (CCH) 910 (1972).

eat at certain times and places. The troopers remain on duty throughout their meals. They may not bring a meal from home or return home to eat their meal. As part of their job the troopers are required during their meal break to be available to the public not only to respond to emergencies but to provide any information the public may seek. Thus, they are frequently interrupted during meals and are subject to being called away from a meal for an emergency, whether they have eaten what they have paid for or not.[11]

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[11] Many expenses are simultaneously business and personal expenses. This is plain enough with regard to a meal; most people would eat a meal even if they did not work. Although an argument can thus be made for disallowing any deduction for meals or allowing a deduction only for the amount the expenditure exceeds "that ordinarily required for such purposes when at home," neither of these positions have been adopted by the Internal Revenue Code. *See Correll*, 389 U.S. at 301 n.6; *Moss*, 758 F.2d at 212-13. For example, a taxpayer who takes a client out to lunch can deduct the expense of his own lunch, provided the expense is "different from or in excess of that which would have been made for the taxpayer's personal purposes." *Moss*, 758 F.2d at 213, quoting *Sutter v. Commissioner*, 21 T.C. 170, 173 (1953). (The Tax Reform Act of 1986 enacted some restrictions on the deductibility of these expenses. *See, e.g.*, I.R.C. § 274 (1986)). In this case, the troopers must either eat at a public restaurant in accordance with the General Order, or forego a meal altogether. For most individuals, working an 8½ to 9 hour shift removes the meal from a question of personal choice. Once a trooper has decided to eat, the state dictates that the trooper eat at a public restaurant, at a certain time, with a specified number of other troopers. The requirements of the job result in frequent purchases of meals or parts of meals that occupational duties require to be abandoned. Thus, this regulation effectively requires the troopers "to spend amounts different from or in excess of amounts they would have spent for their own personal purposes." *See Sutter*, 21 T.C. at 173.

In light of the circumstances of this case, we believe the district court's conclusion that the meal expenses which the taxpayers incurred while on duty in 1981 and 1982 were deductible as ordinary and necessary expenses under § 162(a) is not clearly erroneous. Accordingly, the district court's judgment is affirmed.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. I would reverse the judgment of the district court permitting taxpayers to deduct their expenses for meals. Taxpayers' expenses for their own meals are personal in character and would be incurred by them whether or not the taxpayers were engaged in business activities. Section 262 of the Internal Revenue Code makes "personal, living, or family expenses" non-deductible, and a taxpayer generally may not deduct expenses incurred for his or her own meals unless the expenses are incurred for business travel away from home within the specific provisions for deductibility set forth in Code § 162(a)(2). This court's holding in *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966), that the mid-shift meal expenses of Minnesota state troopers were deductible as business expenses for travel away from home, was overruled by the Supreme Court in *United States v. Correll*, 389 U.S. 299 (1967). Viewing the holding of *United States v. Correll*, that such meal expenses could not be deducted under § 162(a)(2) to be inapplicable here and reasoning that the various conditions imposed by the patrol meant that taxpayers took their meals for their employers' convenience. The district court held that the general provisions of § 162(a) authorizes deductions of taxpayers' meal expenses. This holding is incorrect.

Deductions are matters of legislative grace, existing by virtue of specific legislation, and a taxpayer claiming the benefits of a deduction must point to the applicable statutory authority and show that he or she comes within its terms. *New Colonial Ice Company, Inc. v. Helvering*, 292 U.S. 434, 440 (1934). The provision invoked by taxpayers in the district court is § 162(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 162(a)) that permits a deduction for the ordinary and necessary expenses paid or incurred during the taxable year in caring on a trade or business.[1] Section 162(a)(2) specifically includes within the meaning of ordinary and necessary business expenses the cost of traveling, including the entire amount expended for meals, while away from home in pursuit of a trade or business, but this section only applies where the taxpayer is away from home on a trip requiring him to stop for sleep or rest, and was not relied on by taxpayers at trial. *United States v. Correll*, 389 U.S. at 300.

Section 262 of the Internal Revenue Code, however, prohibits any deduction for "personal, living or family expenses," unless expressly allowed by another provision of the Code.[2] A taxpayer expenses for his or her own meals are personal in character because

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[1] In this regard, an employee, such as each taxpayer here was, is considered to be engaged in "the business of earning his pay." *Noland v. Commissioner*, 269 F.2d 108, 111 (4th Cir. 1959), *cert. denied*, 361 U.S. 885 (1959).

[2] The deduction allowance provision contained in § 262 takes precedence over the deduction allowance provision of § 162(a), to the extent that there is any conflict. *See Commissioner v. Idaho Power Co.*, 418 U.S. 1, 17 (1974); *Sharon v. Commissioner*, 66 T.C. 515, 522-23 (1976), *aff'd*, 591 F.2d 1273 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979).

they would have been incurred whether or not the taxpayer had engaged in business activity. As a result, the courts have consistently held that the cost of restaurant meals or groceries purchased for consumption at work are not deductible. *See, e.g., Moss v. Commissioner*, 758 F.2d 211 (7th Cir. 1985), *cert. denied*, 474 U.S. 979 (1985); *Alvarado v. Commissioner*, 49 T.C.M. (CCH) 967 (Mar. 19, 1985), *aff'd* by unpub. op., 781 F.2d 901 (5th Cir. 1986); *see also, United States v. Correll*, 389 U.S. at 302, n.7. Yet in this regard the district court's holding in this case nevertheless purports to find an exception to this well-established rule of non-deductibility for Minnesota state troopers.

The tax treatment of cash allowances and expenses for meals taken by troopers while on duty has received substantial attention by Congress and the courts. Section 119 of the Internal Revenue Code enacted in 1954, excluded from an employee's gross income the value of employer-furnished meals if the meals were provided for the employer's convenience, on its business premises, and for substantially non-compensatory reasons. 26 U.S.C. § 119 (1987). Congress, at the same time provided in § 120 of the Code, for an exclusion of up to $5.00 per day of statutory subsistance allowance paid to police officers. In 1958 this section was repealed because it was "inequitable since there are many other individual taxpayers whose duties also required them to incur subsistance expenditures regardless of the tax effect." H.R. Rep. No. 775, 85th Cong., 1st Sess. at 7 (1958-3 Cum. Bul. 811, 817).

In *United States v. Morelan*, 356 F.2d at 202, involving substantially the same facts as presented here, this court held that the subsistence allowance received by Minnesota state highway patrolmen for

meals was excludable from their income under § 119 of the Internal Revenue Code, and that even if such allowances were includable in gross income, the meal expenses would be deductible under § 162(a) as business travel expenses.[3] In *United States v. Correll*, 389 U.S. at 301, n.5, however, the Supreme Court ruled that traveling expenses incurred in the pursuit of business while away from home are deductible under § 162(a)(2) if, but only if, the travel requires the taxpayer to stop for rest on sleep, thereby overruling this court's holding to the contrary in *United States v. Morelan*, 356 F.2d at 208-10. Several years later, in *Commissioner v. Kowalski*, 434 U.S. 77 (1977), the Supreme Court also overruled *United States v. Morelan's* other holding concerning the excludability from income of the cash meal allowances paid to Minnesota state troopers. *Commissioner v. Kowalski*, 434 U.S. at 82, n.11.[4] Thus, the Supreme Court determined that, contrary to *United States v. Morelan*, state troopers' expenses for meals on duty were not deductible as business expenses under §162(a)(2), and the cash allowance paid to state troopers for meals was not excludable from their income under § 119. *Commissioner v. Kowalski*, 434 U.S. at 77.

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[3] Karl Christey, one of the taxpayers here, was also one of the taxpayers in *United States v. Morelan*, 356 F.2d 199 (8th Cir. 1966).

[4] Congress mitigated the effect of *Commissioner v. Kowalski* by providing, in effect that the decision would be applied to police officers only prospectively and expanded that relief by removing the bars of *res judicata*, the statute of limitations, and other rules of law, in order to permit police officers and state highway patrolmen to claim refunds and credits for meal allowances during taxable years 1974 through 1977. Act of October 7, 1978, Pub. L. No. 95-427, 92 Stat. 996, § 3; Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, 94 Stat. 3521, 3524 § 107.

Despite the clear import of *United States v. Correll* and *Commissioner v. Kowalski* in overruling the *United States v. Morelan* holdings regarding the tax treatment of meal allowances and meal expenses of Minnesota state troopers, and the clear prohibition of § 262, the district court determined that the deduction of the meal expenses of these taxpayers were authorized under the general provisions of § 162(a). The district court apparently believed that *United States v. Correll* had no bearing on this case because taxpayers based their claims under the general provisions of § 162(a) rather than § 162(a)(2).[5] But if the general provisions of § 162(a) were available to render job-related-meal expenses deductible, it is difficult to see why the Supreme Court in *United States v. Correll*, needed to concern itself with whether they were traveling expenses under § 162 (a)(2). Rather, in *United States v. Correll*, the Supreme Court recognized that in general, a taxpayer's meal expenses are personal and non-deductible under § 262, and that the Court needed to concern itself only with the special benefits of § 162(a)(2), which (partly for the reasons of administrative convenience) gives the business travelers "something of a windfall, for at least part of what he spends on meals represents a personal living expense that other taxpayers must bear without receiving any deduction at

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[5] It should be noted that in his dissent in *Commissioner v. Kowalski*, 432 U.S. at 96-98, Justice Blackmun expressed his view that, as a result of the decision, combined with the decision of the Supreme Court in *United States v. Correll*, state troopers were being deprived unfaily of the tax benefits permitted to them under this court's decision in *United States v. Morelan*. Justice Blackmun did not indicate that § 162(a) would provide an alternative basis for deductibility.

all." *United States v. Correll*, 389 U.S. at 301-02. It is quite apparent that the district court entirely failed to take into account § 262 and, in this, clearly erred as a matter of law. Furthermore, it is well-established that a taxpayer's expenses for daily meals consumed at work are personal, non-deductible expenses. The various conditions imposed on these taxpayers do not create an exception to the principle of non-deductibility by transforming the essential personal character of their meal expenses into business expenses allowable under the general provisions of § 162(a).

If taxpayers' daily meals are to be considered business expenses, then they must meet the proper test. The proper test developed by the court over the years is whether an expense is personal in character and would be incurred by the taxpayer whether or not he or she is engaged in the business activity. Stated another way, a personal expense is not rendered deductible by virtue of the fact that the taxpayer incurs the expense while at work. The cost of a taxpayer's own meal, whether or not consumed while on duty is clearly a personal expense. *See, United States v. Correll*, 389 U.S. at 301-02; *Fife v. Commissioner*, 73 T.C. 621, 625 (1980); *Sutter v. Commissioner*, 21 T.C. 170, 173 (1953); § 1.262-1(b)(5), Treasury Regulations on Income Tax (1954 Code) (26 C.F.R. § 1.262-1(b) (1987)).

The courts have consistently held that the cost of restaurant meals or groceries purchased for consumption while at work is not deductible. *See, e.g., Alvarado v. Commissioner*, 49 T.C.M. (CCH) 967 (Mar. 19, 1985), *aff'd*, by unpub. op., 781 F.2d 901 (5th Cir. 1986) (deduction denied for cost of meals consumed by firemen while on duty at fire house;

Hammond v. Commissioner, 49 T.C.M. (CCH) 1562 (May 28, 1985), *aff'd*, by unpub. op. (4th Cir. Feb. 13, 1986) (deduction denied for cost of meals purchased by Virginia state troopers).

So too, it is also well settled that the fact that an expense would not have been incurred "but for" the taxpayer's engaging in a trade or business is not sufficient to permit a deduction if the expense is personal or otherwise of a non-deductible nature. *Kroll v. Commissioner*, 49 T.C. 557, 567 (1968). The cost of commuting to and from work is a classic example of an expense which, although not incurred but for the fact that a taxpayer is working, is nevertheless personal and non-deductible. *Fausner v. Commissioner*, 413 U.S. 838 (1973); *Commissioner v. Flowers*, 326 U.S. 465 (1946). Thus, it would seem that the courts have made clear that some type of expenses are so inherently personal that they do not qualify as ordinary and necessary business expenses, regardless of the role they play in the taxpayer's trade or business. Neither is the fact that the expenses in question herein were required to be incurred as a condition of employment alone sufficient to render such personal expenses deductible.[6]

It is apparent that the expenses which the district court found to be ordinary and necessary expenses of taxpayers' business as employees were instead ordinary and necessary expenses of their daily sustenance. The cost of these meals, daily, represents a substantial portion of the cost of taxpayers' daily subsistence. The holding of the district court, and now joined in by the majority, thus permits these

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[6] Here, however, there was no indication that taxpayers were required to purchase meals as a condition of their employment.

taxpayers to deduct substantial amounts of their ordinary living costs. Such a result clearly is not permitted by the express provisions of § 262 of the Internal Revenue Code.

The district court here did not, in its discussion of the deductibilty of taxpayers' meal expenses, take § 262 into account. The court was legally obligated to apply § 262, however, and in disregarding this provision of the Internal Revenue Code, plainly erred. In addition, the court never made the proper analysis to determine whether an expense is personal or business. It failed, as the majority does now, to recognize that meal expenses are personal and would be incurred whether or not a taxpayer engaged in business activity. Hence, its decision is incorrect.

The district court, now joined by the majority, was persuaded that taxpayers "were subject to duty-related restrictions and requirements concerning their meals while on duty" and that these "restrictions effectively extended the performance of their duties from patrol cars on highways to tables in restaurants." The "restrictions" found by the court to require deductibility were that troopers were required to eat their meals "exclusively" in roadside public restaurants and were subject to interruptions from members of the public and emergency calls." From this the court concluded that taxpayers took their mid-shift meals for the convenience and the benefit of the highway patrol rather than for the taxpayers' own convenience and comfort.

The district court's conclusion that taxpayers took their meals on duty for the employers convenience and benefit is plainly wrong. The court did not find, nor is there any evidence to indicate that the taxpayers were required to purchase meals as a condi-

tion of their employment as troopers.[7] Moreover, the court failed to consider that taxpayers decided what restaurants to patronize, what food to order, how much to spend, and, indeed, whether to eat at all. It is clear, however, that their " 'decision to eat or not to eat and the amount expended thereon was wholly a matter of personal choice,' " and the expenses incurred in making those choices are non-deductible under § 262 of the Internal Revenue Code. *Alvarado v. Commissioner*, 49 T.C.M. (CCH) 967 (March 19, 1985), *citing Banks v. Commissioner*, 42 T.C.M. (CCH) 1016, 1019 (1981).

Can it be that the restrictions placed by the patrol upon state troopers' meals are sufficient to transform taxpayers' personal expenses for their daily meals into business expenses? I think not. For instance, although troopers were required to eat at their scheduled times "unless the call of duty demands otherwise," and were allowed "no less than one half an hour or more than more than one hour during each normal workshift," schedules and time limits for lunch are common to many, if not for most employees whose employer attempts to make fair and efficient use of their personnel. Troopers were required to eat their meals on duty "in a public restaurant adjacent to the highway," but many taxpayers must eat their

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[7] Although in two cases *Sibla v. Commissioner*, 68 T.C. 422 (1978), and *Cooper v. Commissioner*, 67 T.C. 870 (1978), *aff'd, sub nom. Sibla v. Commissioner*, 611 F.2d 1260 (9th Cir. 1980)—the tax court permitted a business deduction under Code § 162(a) for a mandatory contribution to a firefighters communal mess, whether or not he ate, as a condition of employment. Those cases involved very limited circumstances not present here. In any event, the Commissioner of Internal Revenue stated his nonacquiescence in those decisions. *See*, 1978-1 Cumulative Bulletin 2, 3.

meals during working hours in restaurants, and such a necessity does not change the essentially personal nature of their meal expenses. *See, e.g., Moss v. Commissioner*, 758 F.2d 211 (7th Cir. 1985), *cert. denied*, 474 U.S. 979 (1985); *Moscini v. Commissioner*, 36 T.C.M. (CCH) 1002 (July 27, 1977). Finally, troopers were required to inform the patrol where they would be eating and were subject to interruptions by members of the public and emergency calls. Yet many other taxpayers keep "beepers" or are on duty during the meals they take during working hours.

In this regard, taxpayers here are no different from other taxpayers who have to work during lunch. The courts have repeatedly held that business-related restrictions or conditions imposed on the manner in which a taxpayer takes his meals while at work do not change the expenses for those meals into deductible business expenses. *See, e.g., Walsh v. Commissioner*, 52 T.C.M. (CCH) 1344 (1987) (a pharmacist); *Moffit v. Commissioner*, 31 T.C.M. (CCH) at 910, *Liang v. Commissioner*, 34 T.C.M. (CCH) 1298 (Sept. 23, 1975); *Kammerer v. Commissioner*, 35 T.C.M. (CCH) 30 (Jan. 19, 1976) (medical students). As the tax court stated, in *Moss v. Commissioner*, 80 T.C. 1073, 1080 (1983), *aff'd*, 758 F.2d 211 (7th Cir. 1985), *cert. denied*, 474 U.S. 979 (1985), concerning business-related conditions affecting the taxpayers' lunches, the taxpayer—

> Ha[d] not explained . . . how this 'restriction' is any different than that imposed on an attorney who must spend his lunch hour boning up on the rules of civil procedure in preparation for trial or reading an evidence book to clarify a point

that may arise during an afternoon session. In all of these cases, the lawyer spends an extra hour at work. The mere fact that this time is given over the noon hour does not convert the cost of daily meal into a business expense to be shared by the government.

Furthermore, the happenstance that the patrol may have derived incidental benefits, from troopers' public visibility and their accessibility during meals taken while on duty, does not operate to exclude taxpayers' meal expenses from personal or living expenses under § 262. Congress has determined that all taxpayers shall bear their living cost without receiving a deduction unless one has been specifically authorized. *Cf., Fausner v. Commissioner*, 413 U.S. at 839. The convenience and benefit to an employer gained from imposing conditions on where and how employees take their meal does not affect the tax status of the meal except under the provisions of § 119 of the Internal Revenue Code. Hence, the district court improperly reasoned that the convenience to the patrol permitted taxpayers to deduct their daily meal expenses.[8]

Uniformly, the decisions of the courts emphasize that unless a taxpayer can demonstrate that the meal expense is different in character or in amount from

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[8] The court's rationale in this regard appears to use a standard barred from cases determining whether the value of meals and lodging could be excluded from income. This "convenience of the employer" test for excludability from income as the Supreme Court made clear in *Commissioner v. Kowalski*, 434 U.S. at 90-96, did not survive the enactment of § 119 as an independent test; thus proof that the meals were provided as a business necessity was insufficient to permit excludability from income unless the other test of § 119 were also satisfied.

what he ordinarily would undertake, the expense remains a personal non-deductible expense. Here, there is no indication that taxpayers incurred expenses that they would not have had ordinarily or expenses that were extraordinary in amount. Thus, even if a business purpose for taxpayers' meal expenses could be found, the district court, as was the majority, is incorrect in permitting taxpayers to deduct their meal expenses because taxpayers never established that the amount of expenses for their meals while on duty differed from or exceeded amounts they would have spent for their own personal purposes.

For the reasons given herein, this decision cannot and should not be permitted to stand. Therefore, in my opinion it should be reversed and judgment entered for the appellee.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5433

KARL W. CHRISTEY and KATHLEEN CHRISTEY
on behalf of all others similarly situated, APPELLEES,

v.

UNITED STATES OF AMERICA, APPELLANT.

STEVEN L. PILLSBURY and HOLLY L. PILLSBURY
on behalf of all others similarly situated, APPELLEES,

v.

UNITED STATES OF AMERICA, APPELLANT.

Appeal from the United States District Court
for the District of Minnesota

[Filed Mar. 2, 1988]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

March 2, 1988

Appellees will recover from appellant the sum of $150.15 for taxable costs on appeal.

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5433MN

KARL W. CHRISTEY and KATHLEEN M. CHRISTEY, ETC., ET AL., APPELLEES

vs.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the United States District Court
for the District of Minnesota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judge McMillian would have granted the petitions.

Petition for rehearing by the the panel is also denied.

July 21, 1988

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals,
Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil File No. 3-85-1361

STEVEN L. PILLSBURY and HOLLY L. PILLSBURY,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

Civil File No. 3-85-1273

KARL W. CHRISTEY and KATHLEEN M. CHRISTEY,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM AND ORDER

[Filed Aug. 1, 1986]

Plaintiffs Steven L. and Holly L. Pillsbury (Pillsbury) and Karl W. and Kathleen M. Christey (Christey)[1] filed their lawsuits against defendant

[1] When the court refer to Pillsbury and Christey, the court is referring to Steven L. Pillsbury and Karl W. Christey as opposed to Holly L. Pillsbury and Kathleen M. Christey. Holly L. Pillsbury and Kathleen M. Christey are parties solely because they filed joint returns with their husbands, Steven L. Pillsbury and Karl W. Christey, for the 1981 and 1982 tax years.

United States of America (the United States) on February 7, 1985 and February 19, 1985, respectively. The *Pillsbury* case was originally assigned to Judge Harry H. MacLaughlin and was reassigned to this court upon Judge MacLaughlin's disqualification on August 12, 1985. The *Christey* case was originally assigned to Judge Miles W. Lord, was reassigned to Judge Donald D. Alsop upon Judge Lord's retirement, and was eventually reassigned to this court as a companion case to the *Pillsbury* case. The *Pillsbury* and *Christey* cases were subsequently consolidated on December 9, 1985 for purposes of discovery and trial.

Pillsbury and Christey, who are Minnesota State Troopers (Troopers), seek through their lawsuits the refund of income taxes which they believe the United States illegally assessed against and collected from them for the 1981 and 1982 tax years. Pillsbury and Christey, who filed virtually identical complaints, originally sought refunds based on various deductions or exclusions for expenses which they believe were incurred as required by or for the convenience of their employer, the Minnesota State Patrol (the Patrol). These expenses included expenses incurred in connection with meals while on duty, garage, home office, supplies, telephone, and uniform. Before trial Pillsbury and Christey withdrew their claims for refund based on deductions for expenses other than meals and garage. The trial, therefore, was to focus exclusively on the issue of the deductibility or excludability of meals and garage expenses. Pillsbury and Christey also sought to maintain these lawsuits on behalf of not only themselves, but all others similarly situated. Pillsbury and Christey, however, agreed not to pursue their lawsuits as class actions based upon the assurances of the United States that

the decision in these cases would probably apply to other similarly situated Troopers.

These consolidated cases came on trial before the court, a jury trial having been waived, on July 2, 1986. The court has jurisdiction over the subject matter of these lawsuits pursuant to 28 U.S.C. § 1346 (a)(1), jurisdiction over the parties to these lawsuits, and venue is proper. The court now offers this Memorandum and Order which constitutes its findings of fact and conclusions of law as required under Federal Rule of Civil Procedure 52(a).[2]

The Minnesota State Patrol is a state agency with a total complement of 511 uniformed personnel. The Partol, which is a division of the Department of Public Safety, is charged by law with, among other things, enforcing traffic laws, investigating traffic accidents, directing and controlling traffic, providing assistance to the general public, providing information and instruction to the motoring public, and cooperating with other law enforcement agencies in pursuing and apprehending violators of the criminal laws. *See* Minn. Stat. § 299D.03, subd. 1. The Patrol is distributed throughout Minnesota by district, which was divided into 10 geographic districts in 1981 and 1982, with each district being divided into several stations. Troopers are normally on duty between 8½ and 9 hours on a working day, though an 8½ hour tour of duty may stretch into 12 hours. Troopers, however, are subject to call 24 hours a day. While on duty,

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[2] The factual discussion which follows is drawn from the testimony of Christey, Pillsbury, and Colonel D. Rodger Ledding, Chief of the Minnesota State Patrol, and the Findings of Fact to which the parties have stipulated and which have been filed.

Troopers travel between 140 and 300 miles per work shift throughout their station areas.

Troopers while on duty are required to comply with the rules and regulations contained in the General Orders of the Patrol. The General Orders address in detail the duty of Troopers with respect to tolerances and attitudes toward law enforcement and policies, and personal conduct, grooming, dress, and the like. Of particular interest in the lawsuits before the court are the General Orders relating to Troopers' meals while on duty and maintenance and operation of patrol cars. General Orders R 77-20-008,[3] which was in effect during 1981 and 1982, provides Troopers with specific instructions concerning their meals while on duty. Failure to adhere to these instructions renders Troopers subject to reprimand. General Order R 77-20-008 requires that Troopers "eat their meals in a public restaurant adjacent to the highway whenever practical" and "report by radio when they eat and . . . advise the telephone number or the code number of the restaurant where they are eating." The restaurant must be open to the public and may not serve liquor. General Order R 77-20-008 expressly prohibits Troopers from eating meals at home during working hours and has been interpreted to prohibit Troopers from bringing meals from home and eating in their patrol cars. General Order R 77-20-008 also details the time at which Troopers may eat, the time allowed for a meal, and the number of Troopers who may eat together. The principal purpose of the requirement that Troopers eat their meals in a roadside public restaurant, as stated in General Order R 77-20-008, "is to promote public safety and obedience to

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[3] A photocopy of General Order R 77-20-008 is provided in Appendix A to this Memorandum and Order.

the law through the physical presence of Troopers in uniform and to facilitate, through availability to the public, the reporting of accidents and the dissemination of information with reference to the traffic and motor vehicle laws of the state."

The practical effects of General Order R 77-20-008 are numerous. For the Patrol, General Order R 77-20-008 ensures that a minimum number of Troopers are off the road and not patrolling at any given time through staggered meal breaks and designated eating times. General Order R 77-20-008 also ensures the Patrol that a maximum number of Troopers will be covering a geographic area at all times in that Troopers are subject to call during meals. For Troopers, General Order R 77-20-008 means that they are on duty throughout their meals. During meals, Troopers are subject to calls for emergencies and other Patrol business to which they must respond immediately. Troopers are also subject to interruptions during meals from members of the general public who are seeking information about road conditions, weather, traffic laws, or other subjects relating to the responsibilities and duties of Troopers. General Order R 77-20-008 means that Troopers will frequently be interrupted during their meals and will often be unable to finish meals for which they have paid.

General Order R 83-30-004,[4] which was in effect and known as General Order R 81-30-004 during 1981 and 1982, sets forth the requirements Troopers, who have custody of their patrol cars even when they are not on duty, must observe with respect to the operation and maintenance of their patrol cars. General Order R 83-30-004 directs, among other things,

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[4] A photocopy of General Order R 83-30-004 is provided in Appendix B to this Memorandum and Order.

that patrol cars, which are state-owned and contain weapons, expensive electronic devices, and other equipment necessary to the performance of Troopers' duties, "shall not be parked on a city street overnight" and it is the Troopers' "responsibility to provide off-street parking facilities." The Patrol does not provide a central garage for the daily storage of patrol cars, but parking is always available at the stations or District/Section Offices. In fact, "where [Troopers] will be on an off-duty status for a period of seven days or more, [patrol cars] shall be stored at the District/Section Office available for use, unless otherwise authorized by the District Section Commander." Although General Order R 83-30-004 does not require that patrol cars be stored in garages, the Patrol prefers that its patrol cars be stored in garages. The main concern of the Patrol in requiring off-street parking for its patrol cars is to avoid vandalism.

Christey, who was assigned to and lived within the 2500 District, Excelsior State area during 1981 and 1982, has been a Trooper for almost 27 years and is well-known in the area he patrols. During 1981 and 1982, he worked nearly 70 percent of his time at night, which would usually mean a shift from about 3:00 p.m. to 11:00 p.m., and patrolled approximately 140 to 300 miles per work shift. Christey, like any other Trooper, was required to comply with General Orders, including General Orders R 77-20-008 and R 83-30-004. Christey claimed that he spent $962.66 in 1981 and $880.28 in 1982 for meals while on duty and deducted those amounts in his Income Tax Returns for 1981 and 1982. The Internal Revenue Service (the Service) fully disallowed these deductions for meal expenses in both 1981 and 1982

and assessed Christey a deficiency plus interest. Christey also claimed that he spent $300.00 in 1981 and $300.00 in 1982 in renting a garage for his patrol car and sought to deduct those amounts in his Income Tax Returns for 1981 and 1982. The Service disallowed the deduction for garage expense in 1981, but allowed the deduction for garage expense in 1982. All of Christey's expenses for meals and garage were well-documented. On October 22, 1983, Christey paid the Service the full amount of the deficiency assessed against him plus interest for both 1981 and 1982. On August 10, 1984, Christey filed a claim for refund by certified mail for 1981 and 1982. The Service denied by a handwritten note the claim for refund for 1981 on October 29, 1984. The period for review of the claim for refund for 1982 has expired. Christey is the sole owner of the claims for 1981 and 1982 and has made no assignment of the claims.

Pillsbury, who was assigned to and lived within the 2500 District/Minneapolis Freeway Station area during 1981 and 1982, has been a Trooper since 1980. During 1981 and 1982, he worked about 50 percent of his time at night, which would involve a shift from 3:00 p.m. to 11:00 p.m. or 6:00 p.m. to 3:00 a.m., and patrolled approximately 140 to 300 miles per shift. Pillsbury, too, was required to comply with the General Orders, including General Orders R 77-20-008 and R 83-30-004. Pillsbury estimated that he spent $1,410.00 in 1981, but reduced that amount to $944.00 before trial, and $1,452.00 in 1982, but reduced that amount to $968.00 before trial, for meals while on duty. Pillsbury deducted those amounts in his Income Tax Returns for 1981 and 1982, but the Service disallowed these deductions and assessed Pillsbury a deficiency plus interest for both 1981 and

1982. Pillsbury could not provide documentation, such as receipts, of his meal expenses. Instead, he estimated the amount of his meal expenses by multiplying the average amount he spent on meals per day ($4.00) times the number of days he worked in a year (236 days in 1981 and 242 days in 1982). Pillsbury offered some substantiation of the amount spent on meals through reference to cancelled checks and menus of restaurants he frequented and by comparison to the amount Christey spent on meals which was nearly equal to Pillsbury's amount, Pillsbury also estimated that he spent $365.00 in 1981, but reduced that amount to $288.00 before trial, and $300.00 in 1982, but reduced that amount to $298.00 before trial, for providing a garage for his patrol car. Pillsbury deducted those amounts in his Income Tax Returns for 1981 and 1982, but the Service disallowed the deduction for garage expenses for both 1981 and 1982. Pillsbury calculated the amount of his garage expense by multiplying the square footage of the home which the patrol car occupied (.575) times the cost of depreciation utilities, and home insurance for 1981 and 1982. On March 21, 1984, Pillsbury paid the Service the full amount of the deficiency assessed against him plus interest for both 1981 and 1982. On August 10, 1984, Pillsbury filed a claim for refund by certified mail for 1981 and 1982. The Service denied the claim for refund for 1981 on January 29, 1985 and the claim for refund for 1982 on November 23, 1984. Pillsbury is the sole owner of the claims for 1981 and 1982 and has made no assignment of the claims.

An initial concern in this case, which the United States has raised and which the court must consider, is the sufficiency of the substantiation of the amounts

of Christey's and Pillsbury's deductions for meals and garage expenses for 1981 and 1982. The United States does not challenge Christey's substantiation of his meal and garage expenses for 1981 and 1982. Indeed, Christey provided a detailed accounting of his expenses for 1981 and 1982 which included journal entries, receipts, and cancelled checks. The United States, however, does challenge Pillsbury's substantiation of his expenses for 1981 and 1982, but with respect to meal expenses only. The United States contends that Pillsbury, who estimated his meal expenses for 1981 and 1982, has wholly failed to satisfy the general substantiation requirement of 26 U.S.C. § 6001 [5] and the more specific substantiation requirement of 26 U.S.C. § 274(d)[6], with its

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[5] Section 6001, as it existed in 1981 and 1982, provided that:

> Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title. The only records which an employer shall be required to keep under this section in connection with charged tips shall be charged receipts and copies of statements furnished by employees under section 6053(a).

26 U.S.C. § 6001.

[6] Section 274(d), as it existed in 1981 and 1982, provided that:

> No deduction shall be allowed—
>
> (1) under section 162 or 212 for any traveling expenses (including meals and lodging while away from home),

applicable regulations, as read in light of *Perfetti v. Commissioner of Internal Revenue*, 762 F.2d 638 (8th Cir. 1985). Pillsbury responds, first, that § 274 (d) does not apply to this case and, second, that his estimate of meal expenses is sufficient under the circumstances and in light of *Cohan v. Commissioner of Internal Revenue*, 39 F.2d 540 (2d Cir. 1930).

In considering whether Pillsbury has sufficiently substantiated his meal expenses for 1981 and 1982, the court is mindful that, with respect to trade or business expense deductions, the Internal Revenue Code (the Code) "contemplates that taxpayers keep such records as will be sufficient to enable the Commissioner to correctly determine income tax liability." Treas. Reg. § 1.162-17(d)(2). The court is also mindful that "it is recognized that by reason of the nature of certain expenses or the circumstances under which

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(2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity, or

(3) for any expense for gifts,

unless the taxpayer substantiates by adequate records or by sufficient evidence cooroborating his own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility, or receiving the gift. The Secretary may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations.

26 U.S.C. § 274(d).

they are incurred, it is often difficult for an employee to maintain detailed records or to preserve supporting documents for all his expenses." *Id.* For that reason,

> Where records areincomplete or documentary proof is unavailable, it may be possible to establish the amount of the expenditures by approximations based upon reliable secondary sources of information and collateral evidence. . . . A reasonable approximation of meals . . . might be based . . . upon average daily rates for . . . meals prevailing in the particular community. . . . Since detailed records of incidental items are not required, deductions for these items may be based upon a reasonable approximation.

Treas. Reg. § 1.162-17(d)(3).

The court is reminded, however, that in reviewing matters of substantiation of amounts claimed as a deduction,

> due consideration will be given to the reasonableness of the stated expenditures for the claimed purposes in relation to the taxpayer's circumstances (such as his income and the nature of his occupation), to the reliability and accuracy of records in connection with other items more readily leading themselves to detailed record-keeping, and to all of the facts and circumstances in the particular case.

Id.

This approach is consistent with, if not derived from, *Cohan v. Commissioner of Internal Revenue* which found that "[i]t is not fatal that the result will inevitably be speculative. . . ." *Cohan v. Commissioner*

of Internal Revenue, 39 F.2d 540, 544 (2d Cir. 1930). But in the end, "the burden is on the taxpayer to establish that the amounts claimed as a deduction are reasonably accurate and constitute ordinary and necessary business expenses paid or incurred by him in connection with his trade or business." Treas. Reg. § 1.161-17(d)(3).

The court notes that allowing the taxpayer such flexibility in substantiating meal expenses under § 162, as Treas. Reg. § 1.162-17 suggests, creates an apparent conflict with the more specific substantiation requirements of § 274(d), as interpreted in Treas. Reg. § 1.274-5 and discussed in *Perfetti v. Commissioner of Internal Revenue*, 672 F.2d 638 (8th Cir. 1985). This apparent conflict, however, is without substance because the substantiation requirement of § 274(d) does not apply to Pillsbury's meal expenses. The substantiation requirement of § 274(d), which supersedes the doctrine of *Cohan v. Commissioner of Internal Revenue* with respect to certain expenses, contemplates that a taxpayer will not be allowed deductions for expenses "on the basis of such approximations or unsupported testimony of the taxpayer." Treas. Reg. § 1.274-5(a). The expenses to which § 274(d) expressly applies include expenses for traveling away from home (including meals and lodging) deductible under § 162 or § 212, activities of a type generally considered to constitute entertainment(amusement, or recreation or facilities used in connection with such activities and gifts. 26 U.S.C. § 274(d); Treas. Reg. § 1.274-5(a). The substantiation requirement of § 274(d) by its own terms does not apply to expenses such as Pillsbury's meal expenses which were not travel expenses incurred while away from home, entertainment expenses, or gift ex-

penses. Because Pillsbury's meal expenses are not subject to the substantiation requirement of § 274(d), documentation of the exact amount of the meals is not necessary and a reasonable estimate or approximation of the meal expenses is sufficient, especially where the cost of the meals was less than $25.00.

The court believes that, after considering all of the circumstances of this case, Pillsbury has sufficiently substantiated his meal expenses for 1981 and 1982. Pillsbury's meal expenses for 1981 and 1982 were based on a calculation of the average cost of his meals times the number of days worked in those years. Reference to cancelled checks and menus from restaurants which he frequented in 1981 and 1982, such as Lincoln Del, Perkins, and Curran's, and the memory of his meal habits while on duty during that time aided Pillsbury in his calculation. Given the basis of Pillsbury's meal expenses calculation and the similarity between the amount of Pillsbury's estimated meal expenses and Christey's well-documented meal expenses, the court cannot say that Pillsbury's meal expenses are unreasonable under the circumstances.[7]

The primary issue before the court is whether Christey and Pillsbury are entitled to their claims for refunds based on their meal and garage expenses for 1981 and 1982. Whether Christey and Pillsbury are entitled to their claims for refunds depends on

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[7] Although Pillsbury's meal expenses for 1981 and 1982 are sufficiently substantiated under the circumstances, the court would add that it is to Pillsbury's advantage in the future to maintain as complete and detailed records of meal expenses as possible. One method by which Pillsbury may maintain such records is, as Christey has done, through the use of a daily diary or journal and the preservation of receipts.

the deductibility or excludability of those meal and garage expenses. The deductibility or excludability of the meal expenses is determined with reference to § 162(a)[8] and 119.[9] Christey and Pillsbury contend

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[8] Section 162(a) provides in relevant part that:

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> (1) a reasonable allowance for salaries or other compensation for personal services actually rendered;
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and
>
> (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.
>
> * * * *

26 U.S.C. § 162(a).

[9] Section 119 provides in pertinent part that:

> (a) There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—
>
> (1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.
>
> * * * *

26 U.S.C. § 119.

that their meal expenses while on duty are deductible as "ordinary and necessary expenses" incurred "in carrying on any trade or business" under the general provisions of § 162(a) or, in the alternative, excludable as meals provided by their employer for the convenience of their employer on the business premises of their employer under § 119. The United States, on the other hand, contends that Christey's and Pillsbury's meals are not deductible under the more specific provisions regarding meals of § 162(a)(2) or excludable under the terms of § 119 in light of the clear teaching and precedent of *United States v. Correll*, 389 U.S. 299 (1967), and *Commissioner of Internal Revenue v. Kowalski*, 434 U.S. 77 (1977).

United States v. Correll involved a traveling salesman who, because his business required him to eat breakfast and lunch on the road, deducted the cost of his morning and noon meals as "traveling expenses" incurred in the pursuit of his business "while away from home" under § 162(a)(2). The Service disallowed such deductions because the traveling salesman's daily trips required neither sleep nor rest and, therefore, did not satisfy the Commissioner's "overnight rule" for "traveling expenses" incurred "while away from home." The Service found the traveling salesman's meal expenses to be personal, living expenses under § 262 rather than traveling expenses under § 162(a)(2) and not deductible. The Supreme Court upheld the Commissioner's "overnight rule" because it "implement[ed] the congressional mandate [of § 162(a)(2)] in some reasonable manner." *United States v. Correll*, 389 U.S. 299, 307 (1967). *Correll*, consequently, stands for the proposition that one who seeks to deduct meal expenses as "traveling expenses" under § 162(a)(2) must satisfy

the "overnight rule". That proposition of *Correll*, however, has no bearing on the *Christey* and *Pillsbury* cases because Christey and Pillsbury contend that their meal expenses are deductible as "ordinary and necessary expenses" under § 162(a) generally, and not as "traveling expenses" under § 162(a)(2). *Correll* clearly did not foreclose the deductibility of meal expenses as "ordinary and necessary expenses" under § 162(a) generally.[10]

Commissioner of Internal Revenue v. Kowalski involved a New Jersey state trooper who received in advance a biweekly meal-allowance which was included, although separately stated, in the trooper's salary. The purpose of the meal-allowance was ostensibly to reimburse troopers for meals that would otherwise have been taken at a meal station. In this way, troopers could remain on call in their assigned patrol areas during their mid-shift break. Under the meal-allowance, however, troopers were not restricted as to where they could eat in their patrol area and even had the option of eating at home if they lived in the patrol area or bringing a meal from home and eating it in or near their patrol cars. The trooper sought to have excluded from income the amount of the case meal-allowance on the grounds that it was not "income" within the meaning of § 61 and that, even if it were income, it was excludable under § 119. The Supreme Court found with relative ease that the trooper's meal-allowance payments were income within the meaning of § 61 since the payments were " 'undeniabl[y] accessions to wealth, clearly realized,

---

[10] Indeed, the Supreme Court was not presented with this issue in *Correll*, nor did the Court have the occasion to consider the issue later in *Kowalski*. *See Commissioner of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 n.9 (1977).

and over which the [trooper had] complete dominion'." *Commissioner of Internal Revenue v. Kowalski*, 434 U.S. 77, 83 (1977) (quoting *Commissioner of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955)). The Supreme Court also found that § 119 did not cover cash payments of any kind and, therefore, the trooper's meal-allowance payments were not excludable under § 119. *Id.* at 84. As the Supreme Court noted,

> Section 119 provides that an employee may exclude from income "the value of any meals . . . furnished to him by his employer for the convenience of the employer, but only if . . . the meals are furnished on the business premises of the employer. . . ." By its terms, § 119 covers *meals* furnished by the employer and not *cash* reimbursements for meals. This is not a mere oversight. . . . [T]he form of § 119 which Congress enacted originated in the Senate and the Report accompanying the Senate bill is very clear: "Section 119 applies only to meals or lodging furnished in kind."

Id. (citations omitted).

Kowalski clearly did foreclose the excludability of meal expenses paid with a meal-allowance or similar cash payment or reimbursement under § 119 and precludes Christey and Pillsbury from excluding their meal expenses while on duty under § 119.

The issue, then, to be decided with respect to Christey's and Pillsbury's meal expenses is whether they are deductible as "ordinary and necessary expenses" under § 162(a) generally. Section 162(a) provides that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or

incurred during the taxable year in carrying on any trade or business." 26 U.S.C. § 162(a). To qualify as an "ordinary and necessary expense" deductible under § 162(a), "an item must (1) be 'paid or incurred during the taxable year', (2) be for 'carrying on any trade or business', (3) be an 'expense', (4) be a 'necessary' expense, and (5) be an 'ordinary' expense." *Iowa-Des Moines National Bank v. Commissioner of Internal Revenue*, 592 F.2d 433, 435-36 (8th Cir. 1979) (quoting *Commissioner of Internal Revenue v. Lincoln Savings and Loan Association*, 403 U.S. 345, 352 (1971)). Without question, the amounts which Christey and Pillsbury spent on their meals while on duty in 1981 and 1982 were "expenses" which were "paid or incurred during the taxable year[s]" of 1981 and 1982. Under the circumstances, Christey and Pillsbury incurred those meal expenses while "carrying on any trade or business," specifically, the trade or business of being Minnesota State Troopers. Christey and Pillsbury were required as Minnesota State Troopers, as General Order R 77-20-008 evidences, to eat their meals exclusively in roadside public restaurants for the express purpose of promoting public safety and obedience through the physical presence of uniformed Troopers and maintaining maximum coverage of patrol areas with minimal call response time. Christey and Pillsbury were subject to a number of duty-related restrictions and requirements concerning their meals while on duty. Such restrictions effectively extended the performance of their duties from patrol cars on highways to tables in restaurants. Under these circumstances, Christey's and Pillsbury's meal expenses while on duty were "ordinary" and "necessary." The meals which Christey and Pillsbury took

while on duty were taken at roadside restaurants not for the convenience or comfort of Christey and Pillsbury (which was often lacking because of frequent, but welcome, interruptions from members of the public and sudden, but not unexpected, emergency calls), but for the convenience and benefit of the Patrol. Christey's and Pillsbury's meal expenses while on duty were "ordinary and necessary expenses" of their business as Minnesota State Troopers. Christey and Pillsbury, consequently, should have been allowed to deduct the amounts of their meal expenses while on duty in 1981 and 1982 as "ordinary and necessary expenses" under § 162(a).

The deductibility of the garage expenses is also determined with reference to § 162(a). Christey and Pillsbury contend that their garage expenses incurred in connection with their patrol cars are deductible as "ordinary and necessary expenses" incurred "in carrying on any trade or business" under § 162(a) or, alternatively where the garage expenses were due to rent, under § 162(a)(3). The United States, on the other hand, contends that Christey's and Pillsbury's garage expenses are not deductible because their garages were used for both personal and business purposes and their garages were maintained solely for their own convenience and not the convenience of their employer. For Christey's and Pillsbury's garage expenses to be "ordinary and necessary expenses" deductible under § 162(a), they "must (1) be 'paid or incurred during the taxable year', (2) be for 'carrying on any trade or business', (3) be an 'expense', (4) be a 'necessary' expense, and (5) be an 'ordinary' expense." *Id.* Christey's and Pillsbury's garage expenses were clearly "expenses" which were "paid or incurred during the taxable year[s]"

of 1981 and 1982 in "carrying on any trade or business", specifically, the business of performing their duties as Minnesota State Troopers. Under the circumstances, however, it cannot be said that these garage expenses were "ordinary" and "necessary." Christey and Pillsbury provided garages for their patrol cars apparently in order to comply with General Order R 83-30-004. Yet General Order R 83-30-004 requires only that Troopers not park their patrol cars on a city street overnight and that they be responsible for providing off-street parking. General Order R 83-30-004 does not require Troopers to provide garages for their patrol cars. Consequently, Christey's and Pillsbury's garage expenses, while arguably "ordinary", are certainly not "necessary." Christey's and Pillsbury's garage expenses were incurred as a personal convenience to them and not as a business necessity. The Service, therefore, properly disallowed Christey's and Pillsbury's deductions of their garage expenses for their patrol cars in 1981 and 1982 as not "ordinary and necessary expenses" under § 162(a).

In sum, the court believes that the meal expenses which Christey and Pillsbury incurred while on duty in 1981 and 1982 were properly deductible as "ordinary and necessary expenses" under § 162(a). To the extent, therefore, that these deductions were disallowed in 1981 and 1982, Christey's and Pillsbury's income tax liability should be reassessed and refunds with interest should be provided, if appropriate. The court, however, does not believe that the garage expenses for their patrol cars which Christey and Pillsbury incurred in 1981 and 1982 were properly deductible as "ordinary and necessary expenses" under § 162(a).

Accordingly, IT IS ORDERED that:

1. Plaintiffs Steven L. and Holly L. Pillsbury's claim for refund is granted to the extent that their taxable income is to be reduced by $944.00 for 1981 and by $968.00 for 1982, which represents the amounts expended for meals while on duty in 1981 and 1982 and deductible under 26 U.S.C. § 162(a), and the income tax for those years is to be adjusted accordingly and a refund with interest is to be provided, if appropriate.

2. Plaintiffs Karl W. and Kathleen M. Christey's claim for refund is granted to the extent that their taxable income is to be reduced by $962.66 for 1981 and $880.28 for 1982, which represents the amounts expended for meals while on duty in 1981 and 1982 and deductible under 26 U.S.C. § 162(a), and the income tax for those years is to be adjusted accordingly and a refund with interest is to be provided, if appropriate.

LET JUDGMENT BE ENTERED.

Dated: July 31, 1986.

/s/ Paul A. Magnuson
PAUL A. MAGNUSON
United States District Judge

APPENDIX A

PLAINTIFF EXHIBIT NO. 43

GENERAL ORDER

Effective Date January 1, 1978

Number R77-20-008

Subject MEALS ON DUTY

Reference Work Agreement

Special Instructions Rescinds General Orders Manual per Rookie School

Distribution A, B, & C

Re-Evaluation Date December 31, 1978

No. Pages 2

1. Members of the State Patrol are required to eat their meals in a public restaurant adjacent to the highway whenever practical. Troopers shall eat their meals at the specific times indicated on the work schedule.

2. All Troopers shall be granted an unpaid lunch period of no less than one-half hour or more than one hour during each normal work shift except for employees who are assigned to the shift commencing at or near 10 p.m. who will be granted a paid 30 minute lunch period and employees pre-scheduled to remain on full status during a lunch break.

3. No more than two Troopers shall eat together.

4. Members are required to report by radio when they eat and must advise the telephone number or the code number of the restaurant where they are eating.

5. State Patrolmen are not permitted to eat meals at home during working hours and must eat at the scheduled time unless the call of duty demands otherwise.

6. The principle purposes of the requirement that the State Patrolmen eat their meals in a public restaurant is to promote public safety and obedience to the law through the physical presence of Troopers in uniform and to facilitate, through availability to the public, the reporting of accidents and the dissemination of information with reference to the traffic and motor vehicle laws of the state.

7. State Troopers shall be granted one (1) 15 minute rest period during each half shift. Rest periods may not be postponed or accumulated. That is, if a Trooper does not receive a rest period because of operation requirements such rest period may not be taken during a subsequent work period.

APPROVED:

/s/ James C. Crawford
COLONEL JAMES C. CRAWFORD
Chief
Minnesota State Patrol

I have read and understand this rule.

/s/ P. Richards 9/28/78
Signature

APPENDIX B

PLAINTIFF EXHIBIT NO. 44

GENERAL ORDER

Effective Date August 1, 1983

Number R83-30-004

Subject PATROL UNIT, OPERATION AND MAINTENANCE

Reference General Orders 30-003 and 30-010

Special Instructions Rescinds R 81-30-004 and Troopers Memo 77-9

Distribution A, B, C, E, & F

Security Class H

Re-Evaluation Date Until Rescinded

No. Pages 3

I. PURPOSE

To identify the conditions of use and maintenance requirements for State Patrol units.

II. OPERATION

A. State-owned Patrol units are provided for such use as official duty may require. State Patrol units shall not at any time be used for other purposes unless authorized by the District/Section Commander.

B. State Patrol personnel shall patrol in vehicles assigned for that purpose unless otherwise directed by a Supervisor.

C. No person or persons, except other State Patrol Personnel or such persons as duty dictates, shall be transported in Patrol

units without the permission of a Supervisor.

1. A Waiver of Claims Form (PS 18084) shall be completed prior to any ride-along shift with the completed form submitted to the District/Section Office with the Weekly Report.

D. Patrol units shall not be operated carelessly or recklessly.

E. State Patrol units shall not be parked on a city street overnight.

1. It shall be the member's responsibility to provide off-street parking facilities.

2. In instances where Patrol members will be on an off-duty status for a period of seven days or more, assigned units shall be stored at the District/Section Office available for use, unless otherwise authorized by the District/Section Commander.

3. When the Patrol unit is left at the District/Section Office, state shop, or other such facility while on vacation, days off, or for unit repair, it shall be the responsibility of the member to remove such personal issue equipment, e.g., shotgun, camera, flashlight and clothing issued, from the Patrol unit.

III. MAINTENANCE

A. It shall be the responsibility of State Patrol personnel to service and maintain State Patrol units assigned to them.

The following procedure shall govern the maintenance of Patrol units:

1. Routine unit maintenance shall be performed during the member's off-duty hours. Routine unit maintenance includes oil and filter changes, grease jobs and other related maintenance each 4000 miles.

    a. Members may operate the unit while not in uniform for the purpose of taking the unit to the place of service.

    b. Authorized employees of the vendor performing the unit maintenance may operate the unit for the purpose of taking the unit to the place of service.

    c. All unit maintenance and repair shall be entered in the Unit Service Book which shall be kept in the assigned unit at all times.

2. Emergency unit repairs may be performed during a member's on-duty hours. Emergency repairs include any service that could not be postponed until a member goes off duty.

    a. In every instance where emergency repairs are performed while on duty, the member will remain at the place of repair, except when the member is relayed to pick up another unit.

3. Routine maintenance that would take less than five (5) minutes, such as drive-through car washes, may be performed during on-duty hours.

B. Members shall maintain all unit-assigned equipment in proper working order. It shall be the duty of each member to make certain that all such equipment is available in the unit in proper working condition and that expendable items are replaced.

C. Members shall maintain Patrol units as issued with respect to equipment. At no time shall any member add, alter, or remove equipment without the approval of the District/Section Commander.

APPROVED:

/s/ Roger Ledding
COLONEL D. ROGER LEDDING
Chief
Minnesota State Patrol

I have read and understand this rule.

/s/ R. Richards
Signature

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No. 88-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner,

vs.

KARL W. CHRISTEY, ET AL.
Respondents.

BRIEF OF KARL W. CHRISTEY AND STEVEN L. PILLSBURY IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GARY J. HAUGEN (Counsel of Record)
JUSTIN H. PERL
Maslon Edelman Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015
Attorneys for Respondents,
Karl W. Christey and
Steven L. Pillsbury et al.

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No. 88-1023

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner,

vs.

KARL W. CHRISTEY, ET AL.
Respondents.

BRIEF OF KARL W. CHRISTEY and STEVEN L. PILLSBURY IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Respondents[1] submit the following as an addition to the Statement of the Case found in the Petition for the Writ of Certiorari ("Petition").

---

[1] Kathleen M. Christey and Holly L. Pillsbury are also Respondents, solely because they filed joint returns with their spouses, Karl W. Christey and Steven L. Pillsbury, respectively, for the 1981 and 1982 tax years. Reference herein to "Respondents" refers to Karl W. Christey and Steven L. Pillsbury.

The District Court determined that Respondents' expenses for meals while on duty were deductible as "ordinary and necessary" business expenses under the general provision of Section ("§") 162(a) of the Internal Revenue Code ("Code").[2] The trial court based its decision on the facts that Respondents were "subject to a number of duty-related restrictions and requirements concerning their meals while on duty," Petitioner's Appendix ("Pet. App."), 43a, and that their meals were taken "not for the convenience or comfort of Christey and Pillsbury . . . but for the convenience and benefit of the Patrol." Pet. App., 44a.

The Petitioner does not challenge the factual findings of the District Court but

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[2]Code section references herein shall be to the Internal Revenue Code of 1954 (26 U.S.C), unless otherwise noted.

argues that the trial court erred, as a matter of law, in concluding that the taxpayers were entitled to deduct meal costs incurred while on patrol duty under the general provision of § 162(a). At trial, the Petitioner's primary contention was that the meal expenses were not deductible under the specific provisions regarding meals of § 162(a)(2) or excludable under § 119, and thus could not be deducted under the general provision of § 162(a). Pet. App., 6a. The Petitioner did not raise at trial the argument now asserted that § 262, as a matter of law, precludes deductibility of meal expenses under § 162(a).

In addition, Petitioner mischaracterized the opinion of the United States Court of Appeals for the Eighth Circuit ("8th Circuit") as having allowed a deduc-

tion of a personal expense. Petition, 7. Rather, the 8th Circuit held that "under certain limited circumstances, such expenses [the cost of one's meal] may be deducted under the general provision of § 162(a). . . 'when circumscribed by company regulations . . . [give it] the color of a business expense.'" Pet. App., 7a.

The amount of each claim for refund at issue is less than $1,000 for each year in dispute.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS ENGAGED IN THE PROPER ANALYSIS IN DETERMINING WHETHER A PARTICULAR EXPENSE IS A BUSINESS EXPENSE OR A PERSONAL EXPENSE.

The fundamental question which Petitioner asks this Court to consider is whether the test for deductibility of a meal expense under § 162(a) is preempted by § 262 or whether an analysis of the

facts and circumstances under which the expense occurred is appropriate. The 8th Circuit correctly affirmed the factual findings of the District Court and properly applied the well-established law on the issue.

Inherent in the tax law is the notion that an analysis of the facts and circumstances at issue is critical to a just determination. The language of Justice Cardozo contained in Welch v. Helvering, 290 U.S. 111 (1933) sets forth this principle:

> Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.

Id. at 114-115; see also Commissioner v. Duberstein, 363 U.S. 278, (1960) (the role of the factfinder in tax cases is crucial and should be given great weight). Moreover, this Court recently upheld the general position that the resolution of an issue under § 162(a) requires an examination of the facts in each case and further stated that the basis for the decision was derived from "our concern that an attempt judicially to formulate and impose a test for all situations would be counterproductive, unhelpful, and even somewhat precarious for the overall integrity of the Code." Commissioner v. Groetzinger, 480 U.S. ___, 107 S. Ct. 980, 988 (1987) (construing the phrase "trade or business" within the meaning of § 162(a)). In other words, each case bears its own investiga-

tion and analysis, which the trial court has already undertaken.[3]

A. An Analysis of the Facts is Necessary to Determine Whether an Expense is a Business Expense or a Personal Expense.

A determination of whether an expense is a non-deductible personal expense under § 262 or whether it is a deductible business expense under § 162 requires a factual inquiry. See Commissioner v. Heininger, 320 U.S. 467, 475 (1943); Trust of Bingham v. Commissioner, 325 U.S. 365, 370, (1945); Iowa Southern Utilities Co. v. Commissioner, 333 F.2d 382, 385 (8th Cir.), cert. denied, 379 U.S. 946 (1964) ("whether an expense is ordinary and nec-

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[3] To the extent the Petitioner wishes to impose a new gloss on the interpretation of § 162(a) in order to provide for a total preemption by § 262, the ultimate responsibility for this revision rests with the Congress. Groetzinger, supra, at 988; Flood v. Kuhn, 407 U.S. 258, 269-285 (1972); United States v. Correll, 389 U.S. 299, 307 (1967).

essary and whether it is related to business are doubtless pure questions of fact in most instances"); United States v. General Bancshares, 388 F.2d 184 (8th Cir. 1968).[4]

Petitioner gamely argues that § 262 bars any deductions for meal expenses which possess a dual business and personal character, unless the meal was consumed while away from home, overnight, pursuant to § 162(a)(2). However, Petitioner's assertion is unsupported in the law, because under certain limited circumstances, such expenses may be deduc-

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[4] Under most circumstances, the cost of one's meal is a personal expense and thus non-deductible under § 262, which disallows deductions for personal, living, or family expenses. However, § 262 does not end the factual inquiry, as even the regulations thereto state "except as permitted under § 162, 212, or 217 the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses." Treas. Reg. § 1.262-1(b)(5) (1987) (emphasis added).

tible under the general provision of § 162(a) and "that which may be a personal expense under some circumstances can, when circumscribed by company regulations, directives, and conditions, lose its character as a personal expense and take on the color of a business expense." Sibla v. Commissioner, 611 F.2d 1260, 1262 (9th Cir. 1980). Accord Cooper v. Commissioner, 67 T.C. 870, aff'd sub nom., Sibla v. Commissioner, supra; Walsh v. Commissioner, 52 T.C.M. (CCH) 1344 (1987); Belt v. Commissioner, 47 T.C.M. (CCH) 1433 (1984).[5]

---

[5] The list of specific deductions found in § 162(a)(1) through (a)(3) is exemplary only. McCabe v. Commissioner, 688 F.2d 102, 105, n.8 (2d Cir.), cert. denied, 459 U.S. 906 (1982).

B. Petitioner's Preemption Argument Runs Counter to the Case Heavily Relied on by Petitioner, Moss v. Commissioner.

Even the cases relied on by Petitioner do not support its proposition, but rather hold that a balancing relationship exists between § 162(a) and 262. Petitioner argues that the 8th Circuit's decision is inconsistent with Moss v. Commissioner, 758 F.2d 211 (7th Cir.), cert. denied, 474 U.S. 979 (1985), which denied deductions for work-related meal expenses. However, the rationale underpinning the Moss decision is wholly ignored by the Petitioner and, upon even a cursory analysis, reveals that it fully contradicts the Petitioner's position. In short, Moss, supra, specifically required that a factual determination be made in determining whether the cost of one's meal is deductible under § 162 or non-deduct-

ible under § 262. Contrary to Petitioner's position that a taxpayer's meals during working hours cannot, under any circumstances, transform the costs of those meals into deductible business expenses, the Seventh Circuit recognized the possibility of just such a deduction:

> Section 262 of the Internal Revenue Code (Title 26) disallows, 'except as otherwise expressly provided in this chapter,' the deduction of 'personal, family, or living expenses.' . . . and section 162(a) allows the deduction of 'all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .' . . . The Internal Revenue Service concedes, however, that meals are deductible under section 162(a) when they are ordinary and necessary business expenses . . . <u>even if they are not within the express permission of any other provision</u>. . . .

Id. at 212 (emphasis added)[6]. The Moss court concluded that "It is all a matter of degree and circumstance." Id. at 213.

Now that the IRS has lost a factual determination in the present case based upon the same section of the Code at issue in Moss, supra, it would like the United States Supreme Court to blindly adopt a new black letter rule, namely that § 262, as a matter of law, precludes meal expenses under § 162(a) of the Code. This

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[6] The Commissioner in its brief to the Seventh Circuit in Moss, supra, stated that "the determination whether an expenditure is for personal rather than business purposes is a question of fact subject to the clearly erroneous standard of review," Brief for the Appellee, at 10, precisely the position taken by Respondents herein. The Internal Revenue Service ("IRS") had prevailed at the Tax Court level in Moss, supra, and correctly relied upon the rule of law that a factual determination had been made and could only be reversed pursuant to the clearly erroneous standard. The very position the Petitioner now urges on this Court is flatly contradictory to the correct position it previously took in Moss, supra, on the identical issue of deductibility of meals under § 162(a).

new-found proposal, however, is not a true statement of the law, as a meal can, under some limited circumstances, which were established at trial, constitute an ordinary and necessary expense in carrying on one's business under § 162(a). Although the IRS recently agreed with this position in Moss, supra, it apparently has had a change in heart.[7] It now wishes to convert what has always been a question of fact into a matter of law. This legal pirouette is not only contrary to Petitioner's representations to the Seventh Circuit in

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[7] Indeed, at the trial court proceedings and at the 8th Circuit, the thrust of Petitioner's argument was that, based upon a factual analysis, the facts were insufficient to transform Respondent's meal expenses into business expenses. See, e.g., Brief for the Appellant, at 16-21. The 8th Circuit recognized that the Petitioner only "implicitly raised the argument that § 262 precludes deductibility of meal expenses unless a deduction is specifically provided for." Pet. App., 6a, n.5. In any event, the 8th Cir. addressed Petitioner's evolving theory and rejected it as unfounded and unsupported in the law.

Moss, but is also inconsistent with a long line of Supreme Court and lower court cases that hold that the deductibility of business meals is determined upon a factual analysis. The Petitioner should be foreclosed from having it both ways.

C. The Code Contemplates an Interrelationship Between § 162 and § 262.

As the above discussion reflects, the single provision of § 262 does not answer the inquiry involved in this case. Rather, §§ 262 and 162 work together creating, at best, a presumption that expenses which the general population normally incurs, such as commuting and meal expenses, are personal expenses. In this case the presumption was overcome by Respondents with extensive and extraordinary restrictions imposed upon them by their employer and with other

evidence which converted the expense to a business-related expense.

This interrelationship between § 162 and 262 has long been the law.[8] The Courts have consistently held that the determination of whether an expense is deductible under § 162(a) requires a balancing of §§ 162 and 262. In Pevsner v. Commissioner, 628 F.2d 467 (5th Cir. 1980), the Court held that the cost of designer clothing which the taxpayer wore on her job was not deductible because her employer did not preclude her from wearing the clothing away from work. Rather than holding that § 262 precluded a deduction under § 162(a), as Petitioner argues, the

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[8] The IRS has also internally recognized the balancing relationship between §§ 162 and 262. See IRS Manual Supplement MS 40 RDD-91, Section 1.03 (March 22, 1983) ("The determination of whether an expense is ordinary and necessary to the operation of a business is a factual question"). Respondent's Appendix ("Resp. App."), A-1, A-2.

Fifth Circuit indicated that its determination required

> an examination of the relationship between Section 162(a) of the Internal Revenue Code of 1954, which allows a deduction for ordinary and necessary expenses incurred in the conduct of a trade or business, and Section 262 of the Code, which bars a deduction for all 'personal, living, or family expenses.'

Id. at 469. The Court then applied an objective standard to reach "a reasonable interpretation of Sections 162 and 262." Id. at 471. Most importantly, the Court did not preclude the deduction as a matter of law.

Likewise, in McCabe v. Commissioner, supra, the Second Circuit recognized the interrelationship between §§ 162 and 262 in determining "whether petitioner's additional expenses [in commuting from home to work with a gun] were appropriate, help-

ful, normal and expected under the circumstances or so personal in nature as to be non-deductible under I.R.C. § 262 (1976)." Id. at 105.[9] The Petitioner's position is directly contrary to the balancing between §§ 162 and 262 applied consistently in several circuits.[10] The trial court and the 8th Circuit in this case properly analyzed the issue, and the trial court made a factual determination

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[9] Courts have ruled on several occasions upon the analogous question of whether a payment qualifies as an ordinary and necessary expense deductible under § 162(a) or as a capital expenditure not deductible under § 263(a), and have likewise determined that "§ 162(a) and 263 are not mutually exclusive" but rather depend on the character of the transaction to which they relate. Iowa Southern, supra at 385; see also, General Bancshares, supra.

[10] See, e.g., Moss, supra (7th Cir.); McCabe, supra (2nd Cir.); Alvarado v. Commissioner, 49 T.C.M. (CCH) 967 (1985), aff'd, 781 F.2d 901 (5th Cir. 1986); Commissioner v. Doak, 234 F.2d 704 706 (4th Cir. 1956) ("the issue boils down to whether these expenses were predominately personal or business in nature"); Commissioner v. Moran, 236 F.2d 595 (8th Cir. 1956).

based upon the record before it. The Petitioner cannot now argue in this forum that the well-established balancing test is wrong and should be changed.[11]

D. Deductions Have Been Allowed Under § 162(a) for Expenses With Personal Attributes.

The Petitioner seeks to persuade this Court that a business expense without any personal characteristics can be deducted under the general provisions of § 162(a), whereas the deduction of a business expense which has personal characteristics cannot be so deducted, unless expressly provided elsewhere in the Code. Petition,

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[11] The Petitioner appears to concede, to some degree, that a factual determination is necessary. See Petition, 17: "It remains true that in the absence of unusual circumstances . . . meal costs are personal expenses that may not be deducted under § 162(a)." (emphasis added). Although the Petitioner contends that the unusual circumstances are not present here, this is a factual inquiry and one which has already been answered by the trial court.

8-9. Although the Petitioner is only able to cite the introductory clause of § 262 for authority for this proposition, there are many expenses for which deductions have been allowed under § 162(a) which do have personal attributes and which are not expressly provided for in the Code. For example, the Petitioner cites "the classic example . . . [of] the cost of commuting to and from work" as a personal expense not deductible. Petition, 15. Although commuting expenses are generally considered non-deductible personal expenses, such expenses are deductible, under the general provision of § 162(a), when incurred for business purposes, notwithstanding the absence of any express provision allowing the deduction of a commuting expense in the Code. Ellwein v. United States, 778 F.2d 506 (8th Cir. 1985); see

also, Walraven v. Commissioner, 815 F.2d 1246 (8th Cir. 1987); Kasun v. United States, 716 F.2d 1059 (7th Cir. 1982). Although commuting certainly bears personal attributes, in the rare case, the taxpayer overcomes the burden of proof and incurs the commuting expenses through business necessity, permitting a deduction under § 162(a). Ellwein, supra, at 512.

Likewise, in Sibla, supra, and Cooper, supra, the substantial employer-imposed restrictions in connection with meals gave rise to a § 162(a) deduction for firemen who were required to make payments into an organized mess at their fire station. See also Inman v. Commissioner, 29 T.C.M. (CCH) 1168, 1169 (1970) (park ranger permitted to deduct utility expenses under § 162(a) because of employer-imposed living requirement).

Similarly, the record in the present case demonstrates that Respondents were required to purchase meals they could not eat because of police duties and had other substantial employer-imposed restrictions relating to their meals placed upon them, as previously set forth in the record.

E. The Clearly Erroneous Standard Was Properly Applied.

The District Court's conclusion that the taxpayers' meal expenses qualify as ordinary and necessary business expenses was a factual determination. It is undisputed that the trier of fact's decision will not be set aside unless clearly erroneous. Commissioner v. Duberstein, supra; Commissioner v. Heininger, supra, at 475; Commissioner v. Flowers, 326 U.S. 465, 470 (1946) (a "[T]ax Court's inferences and conclusions on such a factual matter, under established principles,

should not be disturbed by an appellate court.") As recently stated by this Court, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985). Since the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the rule does not allow reversal even if the reviewing Court is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Id. at 574.[12]

The Petitioner has not challenged, and cannot now challenge, the factual findings of the District Court and is, therefore, bound by them. Specifically,

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[12] The rule itself applies also to factual inferences from undisputed basic facts. Austin v. Commissioner, 298 F.2d 583, 585 (2nd Cir. 1962).

the District Court found that Respondents were entitled to deduct the amounts of their meal expenses while on duty in 1981 and 1982, because they constituted "ordinary and necessary" expenses under § 162(a). In making its determination, the District Court made factual findings based on all of the evidence and circumstances, including the specific restrictions under which Respondents were required to take their meals and upon the events which took place during those meals.[13] The Court made a specific factual

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[13] Although the Petitioner views the job related restrictions as "relatively minor," Petition, 19, an analysis of them, already undertaken by the trial court, indicates that the employer-imposed regulations were at least as restrictive as those imposed in Sibla, supra, and that they were imposed strictly for the convenience of the employer, the State of Minnesota. See Pet. App., 29a-30a, 44a, 47a-48a and Tr. 34, 59 setting forth some examples of the restrictions and the types of restraints placed on Respondents during their on-duty meals.

determination that all of the facts, viewed together, converted Respondents' otherwise personal expenses into business expenses. Pet. App., 43a, 44a. Although there may be another view of the evidence, namely that contended by the Petitioner that the cost of Respondents' meals were personal expenditures, the fact that the District Court, after a thorough analysis, chose the view of the evidence which rendered the expenses deductible is not clearly erroneous. See Anderson v. City of Bessemer City, supra, at 574. Therefore, there is no need to grant the Writ.

II. THE DECISION OF THE 8TH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

The Petitioner argues that the decision below cannot be reconciled with this Court's decision in United States v.

Correll, 389 U.S. 299 (1967), a case involving a traveling salesman and § 162(a)(2). Petition, 12. However, neither of the courts below had any difficulty reconciling Correll, supra, because it does not address the universe of issues that arise when a taxpayer consumes meals, and specifically does not address the deductibility of Respondents' meals while on duty under the general provision of § 162(a). The Petitioner even concedes that this Court in Correll, supra, "did not expressly reject the proposition that personal meal expenses can be deducted as ordinary and necessary expenses under the general provision of 162(a)." Petition, 12-13. Indeed, this Court acknowledged, without directly considering, the potential viability of § 162(a) as a basis for deduction of meals

when it later considered a claim for exclusion of meal allowances under § 119 in Commissioner v. Kowalski, 434 U.S. 77, 81, n.9 (1977).

The Petitioner, however, purports to argue that Correll, supra, "rests on the basic principle that the deduction of personal expenses must be expressly authorized by the Code," Petition, 9. However, even § 162(a)(2) which purportedly contains express authorization for the deduction of some personal expenses is not definite, but needs interpretation and factual application just as other sections of the Code so require. This Court, in Correll, supra, recognized that "[t]he language of the statute - 'meals and lodging ... away from home' - is obviously not self-defining." Id. at 304. Consequently, even Correll, supra,

upon which the Petitioner heavily relies, does not defeat Respondents' argument that a factual inquiry is necessary.

III. THE DECISION OF THE 8TH CIRCUIT RELATES TO A PROVISION OF THE 1954 CODE WHICH NO LONGER HAS THE SAME IMPACT, AS IT WAS REVISED BY THE TAX REFORM ACT OF 1986.

Contrary to Petitioner's argument that the decision below "encourages substantial factbound litigation," Petition, 9, the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, severely curtails even the ability to take deductions in the first instance, and, consequently, allays the fears expressed by the Petitioner. Section 132 of the Tax Reform Act amended the Code by adding new section 67 ("§ 67"), Resp. App., B-4. Tax Reform Act § 132(a). § 67 provides:

> In the case of an individual, the miscellaneous itemized deductions for any taxable year shall be allowed only to the extent that the aggregate of

> such deductions exceeds 2 percent of adjusted gross income.

§ 67(a). Thus, in the future, taxpayers will be able to deduct only that amount of their meal expenses (together with their other miscellaneous itemized deductions) that exceed two percent of their adjusted gross income, substantially limiting the amount that a taxpayer may deduct as a miscellaneous itemized deduction.

Moreover, miscellaneous itemized deductions under the Tax Reform Act may be deducted only to the extent that such itemized deductions exceed the amount of the standard deduction to which the taxpayer is entitled. See § 63, Internal Revenue Code of 1986, Resp. App. C. The Tax Reform Act had a major impact on the eligibility of a taxpayer to itemize, because Section 102(a) of the Tax Reform Act, Resp. App., B-1 - B-3, increased the

amount of the standard deduction to $5,000 for married taxpayers beginning in 1988.[14] This is a significant increase over the $3,400 zero bracket amount previously available.

The impact of a larger standard deduction and the two percent floor under miscellaneous itemized deductions is to limit the number of taxpayers who itemize:

> The increases in the standard deduction, modifications to specific deduction provisions, and the floor under itemized deductions will simplify the tax system by substantially reducing the number of itemizers. As a result of these changes, about 13 million itemizers will shift to using the standard deduction, a reduction of approximately 30 percent in the number of itemizers relative to present law.

H.R. Rep. 99-426, 99th Cong., 1st Sess. 88 (1985). Therefore, as a result of the Tax

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[14] The amount of the standard deduction is adjusted for inflation beginning in 1989 and years thereafter.

Reform Act, the spectre of an increasing wave of "factbound litigation" is unfounded.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GARY J. HAUGEN (Counsel of Record)
JUSTIN H. PERL
Maslon Edelman Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

Attorneys for Respondents,
Karl W. Christey and
Steven L. Pillsbury, et al.

Dated: January 23, 1989

APPENDIX A

INTERNAL REVENUE SERVICE

MANUAL SUPPLEMENT

MS 40 RDD-91

March 22, 1983

PART IV - Audit and Investigation

CHAPTER:

Direct Sellers of Home Products Study

PURPOSE:

Section 1. Purpose, Scope and Background

* * * *

.03 Subject to certain limitations and substantiation requirements, ordinary and necessary expenses incurred by an individual in carrying on a trade or business are deductible for income tax purposes (Code Sec. 162). The determination

of whether an expense is ordinary and necessary to the operation of a businesss is a factual question.

* * * *

APPENDIX B

PUBLIC LAW 99-514 [H.R. 3838];
October 22, 1986

TAX REFORM ACT OF 1986

* * * *

TITLE I-INDIVIDUAL INCOME TAX PROVISIONS

SUBTITLE A-RATE REDUCTIONS; INCREASE IN STANDARD DEDUCTION AND PERSONAL EXEMPTIONS

* * * *

SEC. 102. INCREASE IN STANDARD DEDUCTION.

(a) GENERAL RULE -- Section 63 (defining taxable income) is amended to read as follows:

"SEC. 63. TAXABLE INCOME DEFINED.

"(a) IN GENERAL.--Except as provided in subsection (b), for purposes of this subtitle, the term 'taxable income' means gross income minus the deductions allowed

by this chapter (other than the standard deduction).

"(b) INDIVIDUALS WHO DO NOT ITEMIZE THEIR DEDUCTIONS.--In the case of an individual who does not elect to itemize his deductions for the taxable year, for purposes of this subtitle, the term 'taxable income' means adjusted gross income, minus--

"(1) the standard deduction, and

"(2) the deduction for personal exemptions provided in section 151.

"(c) STANDARD DEDUCTION.--For purposes of this subtitle--

"(1) IN GENERAL.--Except as otherwise provided in this subsection, the term 'standard deduction' means the sum of--

"(A) the basic standard deduction, and

"(B) the additional standard deduction.

"(2) BASIC STANDARD DEDUCTION.--For purposes of paragraph (1), the basic standard deduction is--

"(A) $5,000 in the case of

"(i) a joint return, or

"(ii) a surviving spouse (as defined in section 2(a)

* * * *

SUBTITLE D-PROVISIONS

RELATED TO DEDUCTIONS

* * * *

SEC. 132.2--PERCENT FLOOR ON MISCELLANEOUS ITEMIZED DEDUCTIONS.

(a) GENERAL RULE.--Part I of subchapter B of chapter 1 (defining gross income, adjusted gross income, etc.) is amended by adding at the end thereof the following new section:

"SEC.67.2--PERCENT FLOOR ON MISCELLANEOUS ITEMIZED DEDUCTIONS.

"(a) GENERAL RULE.--In the case of an individual, the miscellaneous itemized deductions for any taxable year shall be allowed only to the extent that the aggregate of such deductions exceeds 2 percent of the adjusted gross income.

* * * *

APPENDIX C

26 U.S.C. § 63.

TAXABLE INCOME DEFINED

(a) IN GENERAL.--Except as provided in subsection (b), for purposes of this subtitle, the term "taxable income" means gross income minus the deductions allowed by this chapter (other than the standard deduction).

(b) INDIVIDUALS WHO DO NOT ITEMIZE THEIR DEDUCTIONS.--In the case of an individual who does not elect to itemize his deductions for the taxable year, for purposes of this subtitle, the term "taxable income" means adjusted gross income, minus--

(1) the standard deduction, and

(2) the deduction for personal exemptions provided in section 151.

* * * *

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1023

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

KARL W. CHRISTEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. In the petition, we explained (Pet. 9-11) that the Internal Revenue Code explicitly addresses the question of the deductibility of personal expenses when incurred in a business-related context. Section 262 provides that, "[e]xcept as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." And the Code provides (see Sections 161, 261) that this prohibition takes precedence over the provisions of the Code that allow certain itemized deductions, such as the deduction for "ordinary and necessary" business expenses (Section 162(a)).

Expenses incurred for one's own meals, which are normally eaten in order to satisfy a person's physical need for sustenance, are the sort of expenses that ordinarily would be regarded as clearly "personal," and therefore within the

purview of the nondeductibility rule of Section 262. This does not mean that the cost of one's own meal is never deductible. Section 262 does not disallow the deduction of personal expenses, like meals, if a deduction is expressly provided elsewhere in the Code; for example, expenses for one's own meals incurred while traveling overnight away from home are deductible under Section 162(a)(2).[1] Moreover, as discussed in our petition (at 11, 16-17), there may be some unusual situations in which an apparently personal expense, such as the cost of one's meal, is so imbued with a business purpose as to overwhelm its character as a personal expense and therefore permit it to be deducted as a business expense under the general provisions of Section 162(a). For example, a person engaged in the business of reviewing restaurants could reasonably regard expenses for meals in restaurants under review as incurred for predominantly business purposes, rather than for nourishment. As this Court has stated, however, the general rule is that "the taxpayer whose business requires no travel [that would bring him within the reach of Section 162(a)(2)] cannot ordinarily deduct the cost of the lunch he eats away from home" (*United States* v. *Correll,* 389 U.S. 299, 302 n.7 (1967)).

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[1] The general provision of a deduction for ordinary and necessary business expenses in Section 162(a) cannot qualify as the "express" provision of a deduction for personal expenses within the meaning of Section 262. It is fundamental that, quite apart from Section 262, "a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms" (*New Colonial Ice Co.* v. *Helvering,* 292 U.S. 435, 440 (1934)). Thus, if every general provision for an itemized deduction fell within the exception to Section 262, the general prohibition on the deduction of personal expenses would be a nullity because it would not affect *any* otherwise deductible expenses. Rather, the exception stated in Section 262 refers only to provisions that clearly authorize the deduction of personal expenses, such as Section 162(a)(2) or Section 217 (see Pet. 11).

The court of appeals' decision in this case sharply diverges from this well-settled framework. The deduction of respondents' meal expenses concededly was not authorized by any express provision of the Code, such as Section 162(a)(2). Nor can it reasonably be said that the expenses were so imbued with a business purpose that they lost their character as personal expenses covered by Section 262. The sole purpose of the meals was to serve the quintessentially personal need of respondents for nourishment. The court of appeals suggested no purpose for the meal expenses other than sustenance, and it certainly made no attempt to demonstrate that the exigencies of respondents' business were such that these meals served a business, rather than a personal, purpose.[2] Instead, the court of appeals held that respondents are permitted to deduct their lunch expenses because their ability to eat their lunch freely was somewhat circumscribed for the convenience of their employer—specifically, by the requirements that they be on call and eat in roadside restaurants. That holding permits the deduction, as ordinary and necessary business expenses under Section 162(a), of what are undeniably personal expenses, and therefore it is inconsistent with

[2] Of course, it can be said that the satisfaction of troopers' need for sustenance advances the business interest of the Highway Patrol because the Patrol and the public are better served by well-nourished troopers, rather than ones who are weakened by having missed lunch. But Section 262 operates to make clear that no deduction is allowed for an expense that serves a business interest by means of satisfaction of an individual's personal needs (and thus might arguably be regarded as an ordinary and necessary business expense under Section 162(a) standing alone). In this respect, the meal expenses here are no different from commuting expenses or clothing expenses—or, for that matter, the expense of meals consumed at home. Obviously, an individual's business requires him to be present, to be clothed, and not to be incapacitated by malnutrition, but those expenses are personal expenses that are not deductible.

both the Code and a long line of lower court decisions (see Pet. 13-16).[3]

The decision below takes a narrow offshoot of the general rule that meal expenses are not deductible—the principle that what is ordinarily a personal expense can in some circumstances be so endowed with a business purpose that it is no longer a personal expense—and unacceptably ex-

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[3] The cases cited by respondent for the proposition that personal expenses routinely may be deducted under the general provision of Section 162(a) are inapposite. *Walraven* v. *Commissioner*, 815 F.2d 1246 (8th Cir. 1987) (Br. in Opp. 20), involved the general principle that a taxpayer who is temporarily living away from his tax home because of short-term employment may deduct certain expenses as traveling expenses under Section 162(a)(2). In *Ellwein* v. *United States*, 778 F.2d 506 (8th Cir. 1985) (Br. in Opp. 19), a deduction for commuting a long distance to a temporary job was authorized only because of special congressional action, not under Section 162(a). The theory of the deduction was that the expense is not "personal" because, unlike the typical commuting situation, the distance between the workplace and the taxpayer's home is not a matter of personal choice since it would not be feasible for the taxpayer to move closer to a temporary job. That theory, while first accepted by the IRS, was rejected by the Tax Court and subsequently by the IRS, and the deduction was allowed in *Ellwein* only because Congress enacted a transitional rule allowing the deduction. See generally 778 F.2d at 511 n.4; see also *Turner* v. *Commissioner*, 56 T.C. 27 (1971); Rev. Rul. 76-453, 1976-2 C.B. 86; Rev. Rul. 53-190, 1953-2 C.B. 303; Pub. L. No. 95-427, 92 Stat. 996 (1978). In *Inman* v. *Commissioner*, 29 T.C.M. (CCH) 1168 (1970) (Br. in Opp. 20), the court allowed the taxpayer to allocate a portion of his utility expenses as business expenses because they were incurred solely for business purposes, such as operating a short-wave radio for his employer; the remainder of the utility expenses were nondeductible personal expenses. There is no contention here that any portion of respondents' meal expenses were incurred for any reason other than respondents' personal sustenance. Nor is respondents' claim confined to the limited extra expense of purchasing two lunches on particular occasions, if any, when consumption of a paid-for first lunch has been prevented by a call to duty.

pands it into an exception that swallows the rule. As noted in the petition (at 13-16, 19), the decision below opens the door to a myriad of claims for the deduction of personal expenses on the theory of job-related restrictions. There are many people whose lunch options are limited because they must be available to address some job-related problem on short notice; like respondents here, they could arguably claim that their meals are subject to job-related restrictions and hence deductible as business expenses. Moreover, anyone required to wear a business suit at his place of employment can claim that the cost of his clothing is a business expense under the approach of the court below. Thus, certiorari is warranted here to prevent serious erosion of the rule against nondeductibility of personal expenses.

2. Respondents devote little effort to attempting to defend the correctness of the conclusion below that the Code authorizes them to deduct the expenses of daily meals incurred for the sole purpose of providing them with nourishment. Instead, the thrust of respondents' submission is to characterize the issue in this case as an entirely factual one on which the district court's decision must be affirmed unless clearly erroneous. Specifically, respondents contend that the district court's critical factual finding was that "[r]espondents were entitled to deduct the amounts of their meal expenses while on duty in 1981 and 1982, because they constituted 'ordinary and necessary' expenses under § 162(a)" (Br. in Opp. 23), and that it is inappropriate to grant certiorari to review the correctness of that factual finding. Respondents' characterization of the question presented and their related contentions are incorrect.

It is true, of course, that the determination whether a particular expense is a nondeductible personal expense "requires a factual inquiry" (Br. in Opp. 7). The facts ob-

viously must be established before any judgment can be made concerning their legal significance. And whether a particular expense is "ordinary" or "necessary" to a specific business in the circumstances of a particular case can be a factual question (see Br. in Opp. 15 n.8). But the issue presented in this case does not turn on the correctness of any such factual findings; on the contrary, the facts in this case are undisputed. Rather, the issue presented in this case concerns the correct legal framework within which those facts are to be considered in making the ultimate legal determination whether respondents' meal expenses are deductible.

There is no factual finding in this case that supports the proposition that respondents purchased meals for a business, rather than a personal, reason. The district court did find that the particular restaurants in which the meals were eaten were chosen for the "convenience and benefit of the Patrol" (Pet. App. 44a), but it did not question that the reason the meals were purchased was to satisfy respondents' personal need for sustenance. Thus, even if we assume arguendo that the court's findings would support the conclusion that the meals could be viewed as having some degree of business purpose that could justify their characterization as ordinary and necessary business expenses, Section 262 precludes the deduction of what remain essentially personal expenses. In short, only a fundamental legal error permitted the courts below to hold that, notwithstanding the specific prohibition of Section 262, meal expenses incurred for the personal reason of obtaining nourishment can be deducted under Section 162(a) as ordinary and necessary business expenses.[4]

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[4] Respondents, quoting one sentence from the government's court of appeals brief in *Moss* v. *Commissioner*, 758 F.2d 211 (7th Cir.), cert. denied, 474 U.S. 979 (1985), contend (Br. in Opp. 12 n.6) that the government has changed its position on whether the issue presented in

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this case is a legal or a factual one. This contention is mistaken. As we have explained, the inquiry into whether an expense is a nondeductible personal expense requires some fact finding, and it may yield a factual conclusion that a particular expense is "necessary" to a business or that it is incurred for personal, nonbusiness reasons; this element of the analysis is reflected in the quoted excerpt. The ultimate determination of deductibility, however, is a legal question. A more complete examination of the government's brief in *Moss* shows that the thrust of its argument there is consistent with the petition in this case; the government argued not for deference to the Tax Court on clearly erroneous grounds, but that the Tax Court's decision was legally correct because the meal expenses in that case were personal expenses that are rendered nondeductible by Section 262 (*Moss* C.A. Br. at 7, 10 (emphasis omitted)):

> An expense is for personal, rather than business reasons, if it is personal in character and would be incurred whether or not the taxpayer engaged in business activity. An expense for the taxpayer's own meals is presumptively a nondeductible personal expense. In the instant case, where deductions are sought in connection with expenses for daily sustenance, the record is devoid of any indication that taxpayer would not have incurred similar expenses had he declined to eat lunch with his colleagues. The fact that it was convenient for him to incur the expenses while working does not change the personal character of the expenditures.
>
> * * * * *
>
> [T]he deduction disallowance provisions of Section 262 take precedence over the allowance provisions of Section 162.

To the extent the phrasing of the sentence quoted by respondent suggests that the clearly erroneous standard of review necessarily applies to the ultimate determination whether a particular expense is rendered nondeductible by Section 262, that suggestion is mistaken. We note, in any event, that even this mistaken view of the extent to which clearly erroneous review is appropriate would not help respondents because there is no factual finding here that the meal expenses were not personal; rather, the courts below committed legal error in holding that even clearly personal expenses may be deducted under Section 162(a).

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

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